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BRITISH AND AMERICAN EXPERIENCE WITH LEGISLATION AGAINST RESTRAINTS OF COMPETITION

I

COMPARING the legal experience of two countries in dealing with roughly similar problems is a popular sport, and on the whole a useful one. Like skiing, and many other exhilarating sports, however, it is also dangerous.

The charm of comparative law is as obvious as that of foreign travel. Who can resist a sense of pleasure as he leaves the familiar horizons of his own country, and soars over the fence into the gay, exotic tourist's world of another? Familiar features are differently costumed and differently oriented. Policemen, judges and lawyers appear in guises as alien as those of the taxis and the restaurants. Even parliaments, governments, political parties and the process of election itself fall into new patterns. It is easy to get caught on the fence as you sail over it, and come a cropper. The temptation always is the Lorelei song from *My Fair Lady*, which might be rendered for present purposes as "Why can't the British be more like us?" From the point of view of legal theory, the sin is quite as bad as if the song is given in the alternative form: "Why can't *we* be more like the British?"

For the essential point about any two legal systems is that they are and must be different, even when they seem to be most alike. A system of law, to recall Holmes' phrase, embodies the moral history of the people who made it. It is spun of their social and political experience; formed by their customs and their modes of thought; polarised by their past, and by their aspirations for the future. A given rule or practice in any legal system can be understood only in relation to the whole of which it is a living part. At a level of considerable generality, Britain and the United States, and indeed all the Western societies, are bound together by their

common allegiance to certain social and moral ideas, and to certain ways of organising society. At an even higher level of abstraction, one can discern uniformities, derived from the common literature of law, which Western legal systems share with those of the Communist countries of Eastern and Central Europe. But when one descends to the region of work-a-day detail, the differences become as important as the similarities. The composition and design of each corpus of law are necessarily unique—as unique as a fingerprint, or a cathedral.

All the differences between systems of law, however, are not predetermined and immutable. Law is part of history, even as it helps to shape history. But history is hardly a clockwork mechanism which must reveal itself in unalterable patterns. In its catalogue of causes, purpose and accident have a place. The historic configuration of forces within a society offers the men of each of its generations a zone of choice, which they may use or fail to use, for good or for ill. We can hardly concede that reason must always yield in the growth of law to custom, tradition and unreason.

I started by saying that comparative studies could be useful. If they are conducted with a strong sense for the sociological character of law, they can be very useful indeed. The comparative method in law study is of great value to students, in giving them perspective towards their own systems. Comparative studies often shed new light on how a given system of law came to be what it is, and help one to glimpse more clearly the direction in which it is moving. In a contracting world, the comparative method helps to break down the forces of inbreeding and isolation which so frequently narrow our outlooks. And, above all, comparative law can be, and should be, a fertile source of law reform. Many of the most creative periods in the history of law, like comparable moments in the history of other branches of thought and of art, were precipitated by the revelation of foreign practice. Institutions can almost never be transferred intact from one social system to another. But ideas can migrate, and often do. It is sometimes easier to learn from the successes and failures of others than from our own.

These cautionary warnings apply with special force to the subject-matter of this paper, for the social and economic problems of monopoly and restraints of competition arouse a wide public opinion, and have roots deep in the intractable history of every society.

II

After the middle of the nineteenth century, and more particularly in the last quarter of that century, the perennial problems of monopoly and restraint of trade began to present themselves in a new guise in all the industrialised countries. Such problems,

raising basic issues of social justice and economic policy, have always been of concern to the law—occasionally, as in Tudor and Elizabethan times, of acute concern. About one hundred years ago, however, they changed in content and appearance. Both British and American courts began to face situations more difficult than price-rings among local brewers, coopers or salt merchants, and restrictive covenants in the sale of doctors' practices. Science was creating new industries, often on a large scale, and transforming the organisation of old ones. To the familiar rhythm of the railway age, there was added the equally familiar rhythm of the modern factory system. Populations speeded up their movement from farm to city in the vast trek which everywhere defines the industrial revolution.

In the United States, the new industrial economy of the late nineteenth century took shape in a pattern which was somewhat different from that in Great Britain, France and Germany. American corporation law—the law governing the powers of joint stock companies—was state law, and not national law, for reasons characteristic of our federal system. At the time, it was weak law. And Gresham's most famous principle tended to make it weaker. It offered great freedom to the business leaders of the period in devising and carrying out schemes of amalgamation.

As Marshall remarked, the industrial temper in the United States was quite different from that in England.

> "Here few of those who are very rich take a direct part in business, they generally seek safe investments for their capital; and, again, among those engaged in business the middle class predominates, and most of them are more careful to keep what they have than eager to increase it by risky courses . . . In England . . . the dominant force is that of the average opinion of business men, and the dominant form of association is that of the joint-stock company. But in America the dominant force is the restless energy and the versatile enterprise of a comparatively few rich and able men who rejoice in that power of doing great things by great means that their wealth gives them, and who have but partial respect for those who always keep their violins under glass cases. The methods of a joint-stock company are not always much to their mind; they prefer combinations that are more mobile, more adventurous, and often more aggressive. For some purposes they have to put up with a joint-stock company; but then they strive to dominate it, not to be dominated by it."[1]

The American Titans hid neither their lights nor their violins. Advised by an imaginative bar, and financed by imaginative bankers, they established a series of giant holding companies, which had few exact counterparts in Britain, and were in turn different

[1] Some Aspects of Competition (1890), in *Memorials of Alfred Marshall*, ed. A. C. Pigou (1925), pp. 266–267.

from the Continental cartels. Towards the end of the century, companies of this kind, or somewhat looser groupings of a few great combinations, had acquired positions of monopoly or near-monopoly in many basic industries—in steel, oil, sugar refining, anthracite coal, explosives, tobacco, meat packing, the manufacture of farm machinery and shoe machinery, and certain other important trades. Local railways were put together into regional systems, and programmes were developed to eliminate competition among them. One man of towering ambition, E. H. Harriman, even tried to combine all the railway networks of the country into one.

In the United States, as in other countries, protest against the burdens and injustices of industrialisation and urban life gained in strength as the movement itself accelerated its momentum. Discontent was aggravated by the prolonged depression of the late nineteenth century, punctuated in the United States by occasional financial crises and panics, and by endemic and damaging bank failures. It was also a period of falling wheat prices, intensifying the protest of the farming regions. The adjustment of the economy and of the society to the vagaries of the trade cycle and to the pace of its rapid secular growth was both facilitated and complicated by the immense flood of immigrants who poured into the country at this time, largely into the industrial cities and towns. Trade unions were formed, and farmers' organisations of real power emerged, to seek redress against the railroads which transported their products, and against the groups dominating the markets in which they sold, and from which they bought. Vehement and effective popular books, newspapers, pamphlets and cartoons strongly coloured public opinion, in the mood of what was then called "muck-raking." And in that pre-television age, itinerant lecturers travelled up and down the land, denouncing the "malefactors of great wealth," in President Theodore Roosevelt's phrase, and the abuses they were inflicting on the American people. The Business Heroes of the time—or Robber Barons, if you prefer—provided a dramatic focus for the sense of protest. The grandiose scale of their activities, and their manifest power, helped to revive ancient fears of exploitation, and gave strength to the outcry against monopoly.

The atmosphere was starkly described by Mr. Justice Harlan of the Supreme Court of the United States in 1911:

> "All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The nation had been rid of human slavery, fortunately as all now feel, but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people; namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling . . . the entire business of the country,

> including the production and sale of the necessaries of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong." [2]

It was a time of violent strikes, of occasional riots, and of widespread bitterness. Words like Haymarket and Homestead, Pullman, the Molly McGuires and Pinkerton ring in American ears with a force akin to the echoes here of Peterloo and Chartism.

These sombre emotions were discharged, or at least somewhat reduced in intensity, by their release through political action, as well as by the return of prosperity, which relieved some of the economic misery of the eighties and nineties.

The political expression of these grievances was accomplished through the forms of American politics, which, in the examples of Jefferson, Jackson and Lincoln, had already established effective modes for dealing with social discontent. The American movement of social protest never became Marxist, although there were strong Socialists among its early leaders. Nor did it result, as was the case in Great Britain and other countries, in the formation of a political party based on the trade unions and the farmers' societies, or more broadly, on the organised support of the working classes. The historic pattern of the American party system proved to be too strong to be radically altered at this time by the thrust and counter-thrust of industrialism and reform. The party system in the United States takes its shape from the electoral provisions of the Constitution. They make it necessary to elect a President through cumulative majorities, state by state. That need requires our national parties to be coalitions of state and regional parties, not truly national parties at all. Party alignments were then, as they probably are still, too strongly influenced by the passions of the Civil War and the Reconstruction period after it to be fundamentally affected by the new wave of popular feeling. The great cities of the North, with their large immigrant populations, were becoming largely Democratic in their party allegiance, along with the whole of the South. At that time, the South was agrarian and often, though by no means always, quite conservative in economic and social policy, save on the special question of the tariff. While the Republican Party after the Civil War was closely linked to the emergent business class, it included great farm areas in the West, which had been staunchly Unionist during the Civil War. And business groups were not at all united in their views on Big Business and monopoly. The smaller independent business man and banker, and many large business men as well, were quite as opposed, then and now, to economic dominance by a tiny group of

[2] *Standard Oil Co.* v. *United States*, 221 U.S. 1, 83–84 (1911) (concurring opinion).

Titans as were the leaders of farm groups and trade unions. The Republican Party was therefore a coalition, too, and, even after its catastrophic split in 1912, it was rich in progressive and even radical leaders, who appealed in many areas to the spirit of reform.

The nature of the party system determined the way in which the movement of protest found its fulfilment. The pressure of the movement was diffuse, and both parties responded to it, in a long cycle of legislative action which has continued to this day.

The first major response of the law to these demands was the enactment of two federal statutes, the Interstate Commerce Act of 1887, and the Sherman Act of 1890. Neither was passed by a party vote, and both parties have vied since in claiming credit for their passage, and their subsequent development. These statutes have become centres of far-reaching systems, whose influence has been felt in many parts of the economy and the public law.

The Interstate Commerce Act accepted the railroads as natural monopolies, and established an administrative agency, the Interstate Commerce Commission, to undertake their regulation on a continuing basis. At first the powers of the Commission were far from adequate. Gradually, however, as experience accumulated, the statutes were amended, and the Commission's understanding of its problems grew. That the laws and practices through which our transportation industries are now controlled require radical reform, in the light of totally changed conditions, is no reproach to the legislators of seventy years ago, who established the mechanism, and set it on its course.

In the Sherman Act, Congress chose the opposite approach. It did not view monopoly and restraint of trade as inevitable outside the field of public utilities. Nor did it choose the path, which has often seemed congenial to Marxists, of rather encouraging the growth of monopolies, as a stage in capitalist development which could hasten the day when their capitalist integuments would fall away, so that they could readily be nationalised as instruments of the public good. Rather, Congress looked to the competitive market as the principal regulator of price and output, and of wages, interests and profits. The Congressmen and Presidents of the day were confident that a competitive economy would assure a wide dispersal of power and of economic opportunity; they thought it would preserve the most appropriate economic foundation for a political and social order which, as Tocqueville saw, has always considered equality the first of its social ambitions. The policy of competition was even to be applied, to a significant extent, in the railroad industry itself, and later in other industries partially supervised by administrative bodies.

The Sherman Act contains only two brief substantive provisions. It condemns as criminal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce

among the several states, or with foreign nations. And equally, it condemns monopolisations, or attempts or conspiracies to monopolise any part of that trade or commerce. It embraces the entire constitutional area of Congress's power to regulate commerce, and declares for that realm two simple, and seemingly absolute, rules of business behaviour. There follow several novel procedural provisions, which give the Act a potentiality for influence far greater than that of the common law. The federal government is empowered to enforce the Act in criminal proceedings, or, what is more important, through suits in equity. And private persons, injured in their persons or property by violations of the Act, are authorised to sue, and to recover three times their actual damages, and costs, including a reasonable attorney's fee. This provision reincarnates an old English device, and multiplies the number of enforcement opportunities under the Act. There was a fourth enforcement procedure provided in the Act, that of libel, or condemnation of property held under any contract or other arrangement which violated the Act. It was an ingenious idea, but has not proved to be useful.

On the face of it, the immediate background of the Act, and the policy choices made by Congress in drafting it, offer several striking contrasts to the background and structure of the British legislation of 1948 and 1956. Why did Congress place its principal reliance on the ordinary federal courts, and why did it pass such sweeping legislation, absolute in form, and more complete in its prohibitions than comparable legislation in this and other countries?

Congress might have used an administrative agency, like the Interstate Commerce Commission it had just established, or specialised courts, like the Restrictive Practices Court here, or our own Tax Court, and Court of Customs and Patent Appeals. Experiments of that kind were in fact tried from time to time in the United States. We had a specialised anti-trust court, called the Commerce Court, for a few years, and we still have the Federal Trade Commission, established in 1914 as a reform measure to improve anti-trust enforcement. But the main enforcement agency for the anti-trust laws was and remains that of the ordinary federal courts. Their inherent strength in the American scheme of things has made them more satisfactory and more acceptable than any rival institution, over the long run.

The reason for this decision, I think, is the special authority of the judiciary within our public law, and public life. The extraordinary importance of the American judiciary derives in large part from its power to declare statutes and acts of the executive unconstitutional. The power is a discreet one. It is exercised in a common-law matrix, and can only be asserted when a constitutional problem arises inescapably in the course of public or private litigation. Often resisted, it has thus far always prevailed. And

it has become a valued, indeed an almost sacred, part of the political system. It is accepted by the public as a way of keeping political organs within the boundaries of their constitutional power, and of protecting minorities against the risk of majoritarian tyranny. The influence of this function colours the attitude of the American judges to their work, and of the public to the judges. In consequence, our judges approach their tasks with a good deal of the freedom and vigour which characterised the common law of an earlier day. It was thus entirely natural, in the American setting, to turn the policy problems implicit in the Sherman Act over to the judges, who already had quite comparable responsibilities on their desks.

If the task of enforcement was to be carried out primarily by judges, why wasn't the idea of a specialised and expert court accepted? Part of the reason for this choice, I think, was the magnitude of the problem presented. If the Sherman Act was enforceable at all, it would be beyond the reach of a single court, however expert. Then too, it was felt that offences which occurred in different parts of the country should be passed upon by local judges and local juries. And finally, there was an almost instinctive preference for a course which would require large parts of the bar, the judiciary and the public to confront these trying problems, and to be educated in their meaning by participating in their solution. *Per contra*, there is an advantage in having technical problems finally resolved not by experts alone, but by the common sense of the ordinary judicial outlook.

The answer to the second question—why so sweeping a delegation of powers?—should be made in terms both of the situation to which the law was addressed and of the political system which enacted it. Congress was seeking to take a bold and massive step, commensurate with the visible growth of monopolies in the country, and the high state of public feeling on the subject. Legislative records in those days were not so revealing as they are today, with the modern development of Congressional Committees. But enough is available to confirm that Congress wanted to move energetically in altering the pattern of economic organisation. It was not notably precise in defining its goals, nor did it see clearly how far it could succeed in busting the trusts. But it wanted radical action, and sought to take it, through a statute whose words sounded comfortingly familiar to a group of common-law lawyers, but were in fact untried. The absolute declaration of illegality in the Act was thought by some to be at least a respectable version of the common law, and in the United States perhaps the dominant one, the rule, that is, that all general restraints of competition, as distinguished from partial ancillary restraints, are void without regard to their extrinsic reasonableness.

There is another theme in the debates of the time. Congress

wanted to give the courts discretion in interpreting the law, but not too much discretion. The Congressmen were seeking to confine the power they gave the courts, as well as to define it. They intended to confer what is sometimes called a "judicial" rather than a "legislative" discretion, a narrower rather than a wider range of choice for deciding cases in terms of the judges' own ideas of social and economic policy. By the logic of American public life, the courts were their natural choice among possible agencies of enforcements. But Congressmen are men of affairs, and realists. They know that judges tend to be older men, naturally conservative in spirit, who often reflect the ideas of the previous generation. By giving them a firm rule to administer, the Congress hoped to keep them from straying too far from the policy it had rather vaguely in mind.

For the first thirty years or so after 1890, the Supreme Court decided almost all the important cases which reached it in favour of the government. These decisions began to constitute a noticeable economic influence, first in the railroad industry, and then in other industries, as judgments multiplied, and were translated by counsel into the realm of advice, and later of managerial policy.

Even more important than the immediate economic consequences of the Act, in this formative period, was the debate the judges conducted as to its essential meaning. Did the statute do no more than declare the common law rules against monopoly and restraint of trade for the federal realm of interstate and foreign commerce, where common law rules were deemed in this instance not to exist without legislation? Or did it assert a policy as distinctive as its modes of enforcement? Did the word "every" in section 1 mean "every," though the Heavens fall, or some term of less universal implications? The inquiry focused on the chameleon word "reasonable," which the common-law judges had used in several senses in defining public policy towards the enforceability of contracts in restraint of trade.

The controversy within the Supreme Court was resolved in 1911, in two decisions which have remained, for all their ambiguity, as the basic starting point of American anti-trust law ever since.[3] Those cases, and most notably the *Standard Oil* case, announced what was called "the rule of reason" in construing the statute. The formula was bitterly contested at the time, as a retrograde step which weakened the law. But the "rule of reason," as it was announced, and as it has developed in the course of almost fifty active years, differs strikingly from the "rule of reason" which was applied as a matter of common-law doctrine by some American courts, and

[3] *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911); *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911). See H. Thorelli, *The Federal Antitrust Policy* (1955); Letwin, "Congress and the Sherman Act, 1887–1889" (1956) 23 U. of Chicago L.Rev. 221.

by the British courts, and which is embodied in effect in the 1948, and especially in the 1956 British statute.

The American rule of reason is presented in the first place as an independent legislative policy, not a codification of pre-existing common law.[4] This was a distinction of importance, which freed the Act of a stifling potential incubus. The early cases had revealed that there were almost as many versions of the common law as there were judges. Any alternative solution would have sent our judges back to the Year Books, and loaded the Act with a burden of history which might well have sunk it without a trace. This risk was heightened by the presence on the Supreme Court of Mr. Justice Holmes, a considerable legal historian, and an acknowledged authority on the common law, who thought the Sherman Act was "humbug," and in several early cases presented a theory of the older doctrine that would have proved inadequate to the work before the courts.

In the *Standard Oil* case, the Supreme Court acknowledged that the Sherman Act used words which took at least their "rudimentary meaning" from their common law background. It then presented a version of that common law meaning which few of the judges or professors would have recognised. The common law, and the statute, the court said, were concerned with one question, and one question only: does the restraint, viewed in its market setting, constitute a quantitatively significant limitation on competition? If it does, it is illegal as an "undue," and therefore an "unreasonable" restraint of trade. If the practice before the court is price-fixing, or market division, or boycott, or other conduct which could be considered clearly anti-competitive in purpose, in nature, or in actual or necessary effect, then it is "conclusively" presumed to be illegal—that is, it is illegal *per se*, even though the defendants lack monopoly power, or anything close to it, and sometimes even if they hold relatively weak positions in the markets where they do business. Once the court has found an undue limitation of competition in this sense, its discretion under the "rule of reason" is exhausted. It can go no further in considering whether the prices fixed are reasonable or not; whether special circumstances in the industry, such as high fixed costs, secular decline, excess capacity, or the like, justify even a limited degree of co-operation among sellers, as in the public interest. In short, the Act did not forbid bad trusts, and condone good ones. It applied to all, by equating the public interest strictly with the elimination of substantial restraints on competition.

The consequence of the *Standard Oil* case, over the long run, was an essentially economic definition of the offences established by the Sherman Act, condemning all monopolisations, and those

[4] *Cf.* Wilberforce, Campbell and Elles, *The Law of Restrictive Trade Practices and Monopolies* (1957), section 8.

restraints of trade, or partial monopolies, which significantly effected competition in the markets where the defendants carried on business, or, under the more limited tests of the Clayton Act, those restraints which were found to be probable potential clogs on competition in such markets.

This gloss on the rule of reason was not to emerge clearly for thirty years or more, in the normal ebb and flow of the judicial process. I warn you that some of my respected colleagues would not accept the view I have presented, even now. Nonetheless, I believe that it corresponds to the reasoning and the language of the 1911 cases, and, even more important, that it fits the pattern and doctrine of the latter decisions which derive from them.

The American anti-trust statutes went through several cycles of development and interpretation. And they were significantly amended by Congress, most notably in 1914, when the Clayton Act and the Federal Trade Commission Act were passed; during the Depression of the thirties, when they were virtually suspended in favour of compulsory cartelisation under the N.R.A.; and in 1950, when the provision of the Clayton Act against mergers was revived from a condition of judicial euthanasia.

This is not the occasion to attempt even a summary sketch of contemporary anti-trust doctrine, nor an appraisal of its impact on the economy of the United States. I should contend that we have at last achieved a coherent anti-trust theory. In terms of that theory, the various offences of the Sherman Act and the Clayton Act are distinguished largely as embodying different degrees or quantities of monopoly power; and many restrictive practices are treated summarily as illegal, without lengthy trials, on the ground that they are obviously anti-competitive in character or in necessary effect, or that they impose on rivals disadvantages not based on superior efficiency. The ideas of the anti-trust laws have spread widely throughout our public law. They play a part in many of the statutes which establish administrative regulation for the transportation and communications industries, and for banking. Their weight is strongly felt in our law of patents, trade marks and copyrights, and in other branches of law as well—the policy adopted for disposing of surplus plant owned by the government at the end of the war, for example.[5]

The economic consequences of this effort, extending over seventy years now, are harder to evaluate, and impossible to reduce to statistics. The monopolies of the turn of the century have all disappeared, often in response to direct action under the anti-trust

[5] I have recently attempted a conspectus of the anti-trust law, in Chapter 11 of *Planning for Freedom: The Public Law of American Capitalism* (1959). In addition to the works cited and discussed there, see two important books published later, Donald Dewey, *Monopoly in Economics and Law* (1959), and Carl Kaysen and Donald F Turner, *Anti-trust Policy, An Economic and Legal Analysis* (1959).

laws. Several studies of the degree of concentration in the American economy show a rough balance between the forces making for monopoly, and those making for more competition. Studies of specific industries permit one to see the anti-trust influence in action, along with the influence of changing technology, the development of substitutes, and declining costs of transportation, as a factor making for more competition in markets.[6] It is apparent to any observer that the law has denied to American industry some of the easy and efficient forms of open collusion in price making, such as most of those now being examined by the Restrictive Practices Court here, and that it has forced business men interested in collusion to retreat to less obvious, and often less workable, procedures of co-operation. I believe that the laws have had a considerable effect, if not always a uniform one, on the evolution of the American economy, on its structure, its price behaviour, and its atmosphere, and have helped especially to minimize barriers to entry that might otherwise have been insuperable.

The politics of American anti-trust are also worth noticing. The anti-trust laws are defended by sensitive and well-informed members of Congress. The state of public opinion, and the balance between our parties, are such as to require from a Republican Administration an anti-trust enforcement programme quite as zealous and far-reaching as the anti-trust programme of its rival. Even if it wished to do so, the Republican Party could not safely relax or amend the law without risking the accusation of favouring Big Business against Small—a rallying cry any sensible politician would much rather not have to confront.

III

The British legislation of 1948, 1953 and 1956 is the product of a political environment conspicuously different from the one I have sought to describe in Part II. And it came out of an economic setting which reveals significant differences as well.

If we go back to the eighties and nineties of the last century, when the American anti-trust tradition took shape, several formative differences between the relevant circumstances in the two countries appear.

In the first place nothing like the exuberant and dramatic American merger movement occurred in the United Kingdom. A few big combines were formed, it is true, but there was no general explosion of monopoly or near-monopoly in railroads, banking, steel, coal, textiles, ship-building, engineering, or other key

[6] The successive editions of Edward H. Chamberlain's *Theory of Monopolistic Competition* contain a most useful bibliography of literature in this field. A good deal of the economic impact of anti-trust enforcement is perceptively reviewed in Simon N. Whitney's recent book, *Anti-trust Policies, American Experience in Twenty Industries* (1958), and considered in larger perspective by Dewey, and by Kaysen and Turner, in their books cited above, note 5.

industries. Interestingly enough, where one such company was established—the Imperial Tobacco Company—it seems to have been created defensively, in response to a violent intrusion into the British market by the American Tobacco Company.[7] And several of the monopolies which emerged later functioned in new industries, such as the chemical industry, or in the older model of the great colonial trading companies. Practices of collusion probably existed, as did certain trade tactics generally regarded as coercive or unfair —blacklisting, harassment, the use of bogus independents, ordeal by patent litigation, and the like. Donald Dewey concludes that such tactics "were never so ruthlessly and blatantly employed in Britain" as in the United States, "although they may have been more widespread than was generally believed."[8] What documentation there is confirms that both industrial co-operation and local price fixing were far from rare in the British economy, in part by reason of the persistent survival of habits rooted in the customs of the eighteenth century and earlier times. But, as is so often the case, the facts in this instance may be of less importance than what people thought them to be. Public opinion in Britain was not agitated, as American opinion was, by the spectre of an octopus of monopoly.

Secondly, British industry, evolving from its earlier forms of corporate organisation without a dramatic break in continuity, was far more exposed to international competition, and far less protected by tariffs, than its American counterpart. The industrial sector of the American economy, conducted behind the protective wall of a high tariff, was then mainly oriented to a vast and growing domestic market. The importance of this factor in British thought about the monopoly problem is evident in the judgment of Lord Parker of Waddington in the *Adelaide Steamship Company* case. He was commenting on the concept of monopoly as a limiting factor always establishing unreasonableness at common law, and as an element in the Australian Industries Preservation Act. "[M]onopolies," he said, "in the popular sense of the word are more likely to arise, and, if they do arise, are more likely to lead to prices being unreasonably enhanced in countries where a protective tariff prevails than in countries where there is no such tariff."[9]

Thirdly, the prolonged depression of the late nineteenth century

[7] *United States* v. *American Tobacco Co.*, 221 U.S. 106, 171–172 (1911). See Reavis Cox, *Competition in the American Tobacco Industry, 1911–1932* (1933); W. H. Nicholls, *Price Policies in the Cigarette Industry* (1951); Whitney, *op. cit. supra*, note 6, Chap. 11.

[8] *Monopoly in Economics and Law* (1959), p. 285. Prof. G. C. Allen concludes that in the decades before 1914 large combines were important in the soap, alkali, explosives, salt-mining, tobacco, whisky and cement industries. "Monopoly and Competition in the United Kingdom." in Edward H. Chamberlin, *Monopoly and Competition and their Regulation* (1954), at p. 88.

[9] *Attorney-General of Australia* v. *The Adelaide Steamship Co., Ltd.*, [1913] A.C. 781, 796.

was probably somewhat shorter and less acute in the United Kingdom than in the United States. Depression, obviously, is a great exacerbator of social tension. And in the United States much of the animus heightened by that experience was directed at the target of Big Business, and Big Business Men.

From the point of view of public opinion, the immediate context of political action, two differences between the countries seem worth special notice. The mood of social protest was of course quite as vehement in the United Kingdom as in the United States. But it was concerned with a somewhat different combination of issues and aims.

First of all, like most modern British political philosophy, British opinion was not nearly so preoccupied as American political thinking always is with the problem of power. Many elements of American experience, from the federal structure of the nation to the pattern of the Constitution, make American politics extremely sensitive to the risks of concentrated power. It was historically natural that American opinion reacted strongly and emotionally to the threat of economic dominance by a small group of rich men, most of whom lived in New York. And it was equally natural that the threat of economic concentration seemed less real, and less ominous, in Britain. The British social order is historically different from the American, far more unified, and seemingly less egalitarian, in all its symbols of prestige. The system of Cabinet Government represents a unification of political power, in fact and in form. And it hardly seems shocking to British opinion that the reins of authority be held in large part by small groups, centred in London, trained in the same schools, and moving in the same society. The thought of what is now called an Establishment carries one set of connotations in Britain, a modern democracy which has used and preserved the forms of older social systems, is governed from one capital, and has an immense capacity to canalise new social forces into familiar channels, but carries quite another in the United States, a larger country, with many scattered centres of influence, governed neither from New York nor Washington, and obsessed with dreams of equality, and with fears of anything resembling the ancient oligarchy against which it once revolted.

In the second place, the British literature of social protest towards the end of the last century was different in positive content from that of the United States. Its dominant voices proposed notably different approaches to the miseries and injustices of the day. The Webbs and Bernard Shaw, the other Fabians, the co-operators, and the Toynbees were never interested in busting trusts. Socialism, not competition, was the favoured radical answer to concentrated economic power. There was therefore notably little political interest in the kind of reform undertaken in the United States. The new Labour Party was on another track. Its members tended to regard

the Sherman Act as either a sham, or as a superficial and foredoomed attempt to interfere with the laws of history. Indeed the Labour Party has only recently come to the view that legislation to prevent restraints of competition is worth much effort, or has much promise. The Liberal Party was absorbed in a variety of other problems of great public interest. And the Conservative Party had not yet seen its advantage, in the spirit of Tory Democracy, in seeking by legislation to encourage more competition, more enterprise, and freer entry into the markets of the economy.

The economists were as much against monopoly in Britain as in the United States. But for all their influence, they never considered the monopoly problem a major issue of policy for the United Kingdom, comparable in importance to monetary policy or free trade.

Thus it happened that in the great wave of progressive political action in Britain before the first war, legislation to curb monopoly played no significant part, even as a proposal which failed of adoption after a useful battle.

This temper of relative disinterest in the problem of monopoly is reflected in the occasional opinions of the British courts in passing on restrictive practices in the law of contract, tort, conspiracy and property. There are not many such cases—very few, compared with the volume of litigation on the subject in an active commercial state like New York. Several factors may account for the contrast. The costs of litigation are reputed to be higher here than in the United States, and the British business man may be a less litigious creature than his American cousin. There may be a greater reluctance on the part of British business men to spoil commercial relations by litigation. Sir David Cairns has suggested that agreements among competitors, while frequent, were generally assumed to be invalid, and were therefore enforced privately, and not put to the test in court.[10]

The British judgments are fairly consistent in expressing a point of view towards the problem of restrictive trade practices which only a minority of American courts supported before 1890. I must confess, on reading over this line of cases, that I found the differences between their holdings and those of the American courts to be rather less conspicuous than the differences in language and reasoning. The differences in articulating the rules, however, are clear enough.

The key issue in the battle over the meaning of the common law tradition can be seen perhaps most clearly in Judge Taft's classic opinion in the *Addyston Pipe* case. That judgment was one of the most influential documents in the American debate which culminated in the *Standard Oil* decision of 1911, although the Supreme Court's opinion did not fully accept Judge Taft's view.

[10] " Monopolies and Restrictive Practices," in Morris Ginsberg, editor, *Law and Opinion in England in the Twentieth Century* (1959), at p. 176.

Judge Taft faced a contract among manufacturers of cast-iron pipe, largely sold to municipalities and utilities on public bidding. The partners, providing two-thirds of the supply in a large area of the country, agreed to meet secretly in advance of the contracts being let, and to bid among themselves for the work. The highest bidder in the ring became the lowest bidder at the sale, the others sometimes putting in higher bids for the sake of appearances The winner then shared his profits with his collaborators. The plan was defended on the usual grounds of preventing price wars, cut-throat competition, economic suicide, and the like.

The first question the court faced was whether the Sherman Act went beyond the common law, or adopted common law tests. Judge Taft thought the Act was independent of the common law, but prudently put his opinion on the ground that the defendant's conduct violated the common law in any event, and therefore came within the defendants' theory of the statute. He distinguished two lines of cases in the common law, defining the public policy limitations on freedom of contract. The first view, which he supported, would confine the power to make contracts in restraint of trade to those situations where the restraint was ancillary to some other transaction—the sale of good will, for example, the dissolution of a partnership, an employment contract involving knowledge of the employer's trade secrets. Such restraints, he said, were permissible, but only to the minimum extent that they were "reasonably" necessary to permit the principal object of the transaction to be effectuated, and "reasonably" confined as to time and space, by the nature of that transaction. In his opinion, all non-ancillary restraints of competition, such as agreements among competitors as to the prices they charged, the markets they served, the supply they could offer, were invalid at common law, without more. "It is true," he said, "that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not.

"The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it." [11]

Be that as it may, the prevailing rule in the British courts, it is

[11] *United States* v. *Addyston Pipe and Steel Co.*, 85 Fed. 271, 283–284 (C.C.A. 6th, 1898). The opinion continued by finding against the defendants under their theory of the common law, on the ground that the arrangement was unreasonable because it gave the defendants power to fix their prices, within considerable limits, or alternatively, if it should be considered necessary to determine the question (which Judge Taft doubted), because the prices they fixed were unreasonably high.

often said, did give precisely this gloss to the element of "reasonableness" which the judges could take into account in determining the enforceability of contracts which had no purpose other than the limitation of competition. While most of the modern British cases actually deal with the reasonableness of partial, ancillary restraints, such as those involved in the sale of a business, the liquidation of partnerships, the termination of employments, and the like,[12] there were several dicta, and a few decisions, which support the view commonly asserted. The courts seemed to take this position, in partial contrast to that of Judge Taft. The question of the reasonableness of the restriction on grounds of public policy is one of law, not of fact. The judges have been historically jealous of such contracts. Although older views were modified during the nineteenth century, such contracts will not be approved unless the judges are convinced they are reasonable, in reference to the interests of both the contracting parties and the public. Without more, restraints are contrary to public policy, and void, although special circumstances may be proved to justify them. "The onus of proving such special circumstances must, of course, rest on the party alleging them. When once they are proved, it is a question of law for the decision of the judge whether they do or do not justify the restraint. There is no question of onus one way or another."[13] Where a trade or an

[12] Or, alternatively, with the tortiousness of group refusals to deal reprisals and other forms of "boycott" or near-"boycott."

[13] *Herbert Morris, Ltd.* v. *Saxelby* [1916] 1 A.C. 688, 707 (judgment of Lord Parker of Waddington). See also, *Mason* v. *Provident Clothing and Supply Co., Ltd.* [1913] A.C. 724, 733. ("The respondents have to shew that the restriction they have sought to impose goes no further than was reasonable for the protection of their Business.") These views, derived from Lord Macnaghten's judgment in *Nordenfelt* v. *The Maxim Nordenfelt Guns and Ammunition Co. Ltd.* [1894] A.C. 535, 565, seem to provide a basis, or at least a background for the presumption of illegality in the Restrictive Practices Act, and for the distribution of burdens of proof it establishes.

The matter of presumptive illegality, and of the onus of proof in demonstrating it, was not without difficulty before the passage of the 1956 Act, despite the famous passage in *Mitchel* v. *Reynolds* (1711) 1 P. Wms. 181, 192 The most extended modern consideration of the problem appears in *North Western Salt Company, Ltd.* v. *Electrolytic Alkali Company, Ltd.* [1914] A.C. 461. That case was an action for damages, arising from conceded breaches of a 1907 contract under which the plaintiff-appellant, a combination alleged to include substantially all the salt manufacturers of north-west England, agreed to purchase respondent company's entire commercial output of salt (subject to a minor exception) for a four-year period, amounts and prices being specified. The respondents agreed in return not to sell salt, save as distributors for the combination, on the same terms as other distributors. Respondents exercised a repurchase option under this contract, and controversy arose as to its interpretation, and also whether respondents were required to sign a distributor's agreement. Respondents secretly sold salt to the trade, in breach of the contract. In their pleadings, after full consideration of the point, the respondent company did not allege the invalidity of the 1907 contract, but the question arose in the course of cross-examining one of appellants' witnesses. Leave to amend was denied, the trial judge taking the view that if he was satisfied after trial that the contract was on its face illegal and unenforceable as a matter of law, he would take judicial notice of this and disallow the claim. The legality of the 1907 contract, on its face a four-year output contract between a manufacturer and a distributive group,

industry has passed or is likely to pass into the hands or under the control of a single individual or group of individuals, or where a restraint of trade is likely to produce this result, the restraint may on grounds of public policy be unenforceable, as a monopoly illegal at common law and under the Statute of Elizabeth, however reasonable in the interest of the parties. Whether an effective attempt to secure such a monopoly is really being made is almost always a question of fact; in cases of lesser restraint, where the risk of monopoly in this sense does not arise, the judges may approve as enforceable even a general restraint deemed reasonable in the interest of the parties, and not otherwise injurious to the public. In such cases, however, where the reasonableness of a restraint between the parties is in issue, the parties must be seeking to protect some interest other than their advantage in avoiding competition: "the covenantee is not entitled to be protected against competition *per se*," [14] and finally, the concept of criminal

was deemed to turn on its connections with the distribution agreement, and with another agreement (dated 1906), between the plaintiffs and certain other salt manufacturers. Before the court could conclude that the 1907 contract was illegal, it should have had the distribution contract and the 1906 contract fully presented to it, and further, it should have had evidence as to the competition faced by the plaintiffs from foreign or non-member domestic rivals the advantages and disadvantages to the public of the arrangements made, in the light of economic circumstances, and the like. While the court agreed that there were instances where it should refuse to enforce a contract illegal on its face, even though that fact was not pleaded, here it might easily lead to "a miscarriage of justice" (p. 469) to reach such a result, since plaintiff might have been able to produce evidence, had he been warned by the pleadings to do so, "rebutting any presumption of illegality which might be based on some isolated fact" (*ibid.*). The court lacked evidence on questions of fact material to the legality of the contract, and the pleadings "had thrown on the appellants no duty to bring forward such evidence" (p. 470). The case not being completely presented, it was the court's duty not to decide it on this ground.

Viscount Haldane's judgment says that "to be valid a clause imposing a restraint must be reasonable, and he who says that a restraint is so must make it out" (*ibid*). But evidently this burden is soon discharged, in many instances it would seem as a matter of construing the text of the contract rather than of producing evidence to explain it. Then there is an onus on the party alleging the *illegality* of the contract as unreasonable with respect to the public interest to show that it "is calculated to produce a monopoly or enhance prices to an unreasonable extent; . . . once the court is satisfied that the restraint is reasonable as between the parties the onus will be no light one" (p. 473).

This distinction—that the onus of proof of reasonableness as between the parties is upon the proponent of the contract, while its opponent bears the risk of not persuading the court that the contract is void as contrary to the public interest, notwithstanding its reasonableness as between the parties—is frequently met: *Morris* v. *Saxelby* [1916] 1 A.C. 688, 706, 707 (enforceability of covenant restricting employment of former servant). However, the distinction between the two kinds of reasonableness is difficult to sustain. The rules confining ancillary restraints to the minimum compatible with the performance of the principal object of the contract derive from strong rules of public policy —the public interest in allowing a man to pursue his own calling, and in competition as well; these are the same considerations which emerge when the reasonableness of non-ancillary restraints is independently examined.

[14] *McEllistrim* v. *Ballymacelligot Co-operative Agricultural and Dairy Society, Ltd.* [1919] A.C. 548, 564, and see also, at pp. 574, 579, 582. (Rule of dairy co-operative held invalid on suit of farmer member, as an illegal restraint of

conspiracy is not co-terminous with that of the unenforceability of contracts; " no contract was ever an offence at common law merely because it was in restraint of trade. The parties to such a contract even if unenforceable, were always at liberty to act on it in the manner agreed." [15]

From these cases there emerges, although not sharply in terms of holdings, the position that, in the absence of monopoly, the British courts could and should consider whether general, non-ancillary contracts in restraint of competition among competitors should be upheld as reasonable, or condemned as unreasonable, in the light of the prices charged, the circumstances of the trade, and other factors of private and of public interest.[16] In the *North Western*

trade, *ultra vires* the society, for requiring members to sell all their milk to a creamery of the society, it being impossible for a member to withdraw from the society without the consent of its governing committee. The rule is unreasonable between the parties, without regard to larger questions of the public interest, as going beyond what is reasonably necessary for the protection of the covenantee, especially in view of the rules about withdrawal, which virtually enslave members.) See *Horwood* v. *Millar's Timber and Trading Co. Ltd.* [1917] 1 K.B. 305; *Joseph Evans & Co., Ltd.* v. *Heathcote* [1918] 1 K.B. 418 (Court of Appeal), especially at p. 434. Compare however, *English Hop Growers, Ltd.* v. *Dering* [1928] 2 K.B. 174 (Court of Appeal).

[15] *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co. Ltd.* [1913] A.C. 781, 797 (words of Lord Parker of Waddington). See, however, the judgment of Lord Dunedin in *Sorrell* v. *Smith* [1925] A.C. 700, 716-729, especially at 725.

The summary in the preceding paragraph draws on language used in several of the leading cases, particularly *Adelaide Steamship Co.*, *Mason*, *Morris*, *Northwestern Salt*, and *McEllistrim*.

[16] Among the few cases which may be read to uphold non-ancillary agreements restraining competition are *Wickens* v. *Evans*, 3 Y. and J. 318 (Exch. Pleas, 1829) (general demurrer denied to counts of declaration in assumpsit alleging breach of agreement among three trunk and box makers not to compete with each other in designated parts of England, there being no risk of monopoly, or clearly defined collective restraint on the entry of rivals; agreement good against demurrer as a " partial " restraint, on the consideration of the mutual advantage of the parties, in the absence of a showing of disadvantage to the public); and perhaps *Shrewsbury and Birmingham Ry.* v. *London and Northwestern Ry.* (1851) 21 (3) L.J.Q.B.(N.S.) 89, a brief opinion overruling a demurrer in a suit on an agreement between two railroads not to compete on a particular line, there being no risk of monopoly, or of depriving the public of the benefits of competition generally; the agreement " is no more illegal than it would be for two persons engaged in trade to agree that one shall not exercise his trade nor compete with the other in a particular district " (p. 93); *English Hop Growers, Ltd.* v. *Dering* [1928] 2 K.B. 174 (Court of Appeal) (hop-growers co-operative, established as exclusive agency for the sale of the members' crops, sues for liquidated damages under the contract, defendant having sold his hops independently. There was no argument to the reasonableness of the contract in the public interest; it was held not to be unreasonable between the parties).

Mogul Steamship Co., Ltd. v. *McGregor, Gow & Co.* [1891] A.C. 25, may possibly be classed in this group, although it is by no means apparent that a person injured as a result of others making a contract unenforceable among themselves as in unreasonable restraint of trade is *ipso facto* entitled to sue for damages or an injunction, in the absence of a statute (see Lord Field's remarks at p. 57), or a showing of something that could be identified as " malice " rather than commercial rivalry. Unless the element of combination made a difference, absent monopoly or near-monopoly, the legality of a clause in a contract of carriage offering a lower rate for exclusive dealing would seem a problem in interpreting " ancillary " contracts, in Judge Taft's

Salt Co. Ltd. case, for example, which turned in the end on a question of pleading, Lord Parker of Waddington remarked, "The competition between salt producers within the area covered by the agreement . . ., either *inter se* or with salt producers outside this area may have been so drastic that some combination limiting output and regulating competition within the area so as to secure reasonable prices may have been necessary, not only in the interests of the salt producers themselves, but in the interest of the public generally, for it cannot be to the public advantage that the trade of a large area should be ruined by cut-throat competition." [17]

This line of thought does define a difference between the common law in Britain and in the United States, and between the British law and the law of the Sherman Act. The approach of the British courts helps to fix the approach taken in the British statutes of 1948 and 1956.

sense of the term. The facts in the *Mogul* case should be recalled in this connection. The case denied both damages and an injunction to a plaintiff shipping company against the programme of the defendants, a "conference" comprising a large number of the independent, regular shipping lines providing year-round service to Hankow and Shanghai. The conference members offered a 5 per cent. discount to shippers who dealt exclusively with them, to the disadvantage of plaintiffs and other "tramp" operators who sought to share the China tea traffic during its annual six-weeks peak season. There was no showing of malice, beyond defendants' desire to secure for themselves as much of the tea shipped from Hankow as their ships could carry, nor of monopoly, since the court assumed that entry into the business was easy, and (p. 50) that competition would naturally increase if rates rose.

Attorney-General of Australia v. *Adelaide Steamship Co.* [1913] A.C. 781, rests on the Australian Industries Preservation Act, whose criteria, the Judicial Committee of the Privy Council held, were different from those of the common law and of the Sherman Act.

See, denying the claim, *Master, Wardens and Society of the Mystery of Gunmakers* v. *Fell* (1742) Willes 384 (by-law of Gunmaker's Company goes beyond the reasonable regulation of the trade in protecting the public against defective gun-barrels by forbidding any members to sell barrels to non-members in London or within four miles, there being no reason to suppose that non-members cannot fit gun-barrels to stocks as well as members); *Kores Mfg. Co., Ltd.* v. *Kolok Mfg. Co., Ltd.* [1958] 2 All E.R. 65 (Court of Appeal) (agreement among two important competitors in an industry of twenty firms not to employ each other's former employees for a period of five years from the termination of employment held to go beyond reasonable protection of permissible interests); *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society, Ltd.* [1919] A.C. 548, summarised in note 14 *supra*; *Joseph Evans & Co., Ltd.* v. *Heathcote* [1918] 1 K.B. 418 (Court of Appeal).

Nor is *Sorrell* v. *Smith* [1925] A.C. 700 a clear instance, since it involved a contest between rival boycott policies in the same trade, and may have held no more than that plaintiff, having unclean hands, could not obtain injunctive relief. Plaintiff was one of a group of retail newsagents in London. They sought to control the number of newspaper shops by collectively refusing to buy from wholesale newsagents who dealt with retailers opening new shops without their permission. Plaintiff, for the group, ceased buying from R., because R. had sold to an unauthorised shop, and began to buy from W. Defendants, a committee of the newspaper publishers, countered by threatening to cut off W.'s supply unless W. refused to sell to plaintiff, for the purpose of restoring plaintiff's custom to R., and frustrating the retail newsagents' boycott policy. Plaintiff's attempt to restrain defendant publishers from putting economic pressure on W., so that the retailing group could freely put economic pressure on R., failed.

[17] [1914] A.C. 461, 479–480.

What would seem more important than this difference in the content of the word "reasonable" was the difference between the two systems in modes of enforcement. After 1890, the American courts faced a wide range of cases, largely selected by the Government for their public importance, and exploring every aspect of the economic problem of monopoly. The British courts dealt with only a trickle of cases, brought by the happenstance of private litigation, and largely concentrated on the fringes of the problem. They were hardly cases which might have led the British judges to consider whether they really meant what they occasionally said about the possible reasonableness of non-ancillary restrictive arrangements among competitors.

The first of the Committee Reports which led to the 1948 legislation was filed in 1919. It proceeded from the investigation of profit levels during the First World War. The Committee on Trusts commented that trade associations and combines "are rapidly increasing in this country, and may within no distant period exercise a paramount control over all branches of British trade." Academic study of the problem, following Marshall's lead, developed slowly but steadily, with the work of Sargent Florence, Macgregor, Plant, Macrosty, Allen, and the Robinsons. They prepared the way for the present wealth of monographic investigations, which now constitute a considerable part of the literature of British economics. And a series of Committees and Commissions continued to examine various aspects of the problem, especially the vexed matter of resale price maintenance. Neither the twenties nor the thirties proved to be times for action on this front. Britain's painful and depressing ordeal of the twenties was dominated by other issues, and by the attitudes which had crystallised earlier. During the thirties, the setting of the problem of industrial organisation in Britain changed. Free trade was abandoned; co-operation among domestic competitors continued to increase, unrestrained by countervailing effort; and there was more and more British participation in European cartels. And what might be called the Keynesian period in the orientation of economic policy began, with far-reaching consequences in this as in other areas. The British White Paper on Employment Policy in 1944 suggested two aspects of the monopoly problem which have played a considerable role, I should guess, in the development of Britain's vigorous and confident post-war economic policy: the potentialities of more competition in keeping prices down during periods of near inflation; and the advantages of competition over monopoly in permitting the economy to adjust quickly to programmes of stabilisation and growth based on the use of fiscal and monetary policy.

Confronting the prospect of post-war inflation, the 1944 White Paper urged caution and moderation in wage and price policy. One could hardly admonish trade unions not to press for higher wages

without contemplating the forces which may lead to rises in the price of goods. Beyond its precatory words to labour and to business, the White Paper commented on the apparently cumulative growth of monopolistic arrangements and influences in the British economy, and promised that the Government would look into the question further, and consider the possibility of public action against monopoly and restraints on competition.

The second theme of the White Paper—the superior cyclical resilience of a more competitive economy—was barely hinted at in the document, and was certainly not developed. The relationships between market structure and the course of the trade cycle have been a neglected problem in economic theory. But the suggestion of the White Paper is certainly not implausible, both from the point of view of the flexibility of the economy in responding to moves of fiscal and monetary action, and, perhaps more important, as a factor in the complex sociological process of innovation and productivity.[18]

The inflationary bias of post-war full employment, the increasing urgency of British concern with productivity in the struggle for export markets, and, more recently, the articles, books and discussion stirred up by the Reports of the Monopolies Commission and judgments of the Restrictive Practices Court, have tended to bring the monopoly question for the first time into the forefront of consciousness in British thinking about economic policy. Developments in political thought about economic problems served to reinforce this professional and governmental interest, and to give it a wider popular base. As the Labour Party's programme of nationalisation began to meet increasing political and intellectual resistance, it was natural for some members of that Party to become more and more attracted to anti-monopoly legislation as an alternative. This swing of the pendulum in public opinion was heightened by the unpopularity of direct controls as a means for dealing with the price consequences of excess purchasing power. Although the theory was wrong—under the pressure of excess purchasing power, prices seem to rise more in competitive than in monopolistic markets—it was widely believed that competitive market freedom, reinforced by the influence of legislation, could help to limit the price impact of excessive spending. Both in Britain and on the Continent, one of the recurring themes in discussing programmes for broader trading areas is the importance of international competition in keeping prices down. Then again, other countries, and the European Economic Community, were experimenting with anti-monopoly legislation, and visiting Americans never fail to preach its virtues. This trend in post-war thought, and law, was emphasised by the

[18] I have tried to review this web of issues in Chapter 10 of the book referred to in note 5, *supra*. I should perhaps warn any curious reader that I am rewriting the chapter.

prolonged and thus far ineffective efforts to secure an international treaty against restrictive business practices, first through the Havana Charter, and later through a special United Nations Committee.

Against this background, the British Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948 was passed, to be amended slightly in 1953, and substantially changed in content and procedure by the Restrictive Trade Practices Act of 1956, following on the important Report of the Monopolies' Commission on Collective Discrimination, in 1955. The 1948 Act, in retrospect, seems to have been primarily an attempt to explore the realities of the problem in depth—a research effort, intended to accumulate information on the basis of which policy might later and more rationally design a suitable law. In that perspective, the 1956 Act appears as a first, but probably not the final response of the British Parliament to a problem whose contours are only beginning to be revealed.

This is not the occasion, nor is there need here, for a detailed description of the plan of these two statutes, and of the ideas they embody.[19] Suffice it to recall for present purposes that the British law now establishes four distinct procedures and standards in this field:

First, certain classes of agreements or arrangements among competitors in the production and supply of goods in the United Kingdom must be registered under the 1956 Act, when they contain "restrictions"[20] as to prices, terms of sale, the kinds or quantities of goods to be produced, the use of processes, customers, or areas where sales or purchases can be made. Once agreements are registered, the Registrar, whose important office is established by the Act, must bring proceedings to test their validity before the Restrictive Practices Court, consisting of lay and legal members. While

[19] In addition to the several useful legal treatises already available on the statute and its interpretation, reference should be made at least to C. Grunfeld and B. S. Yamey, "United Kingdom," in W. Friedmann, editor, *Anti-Trust Laws, a Comparative Symposium* (1956), p. 340 and "Restrictive Trade Practices Act, 1956" [1956] *Public Law* 313; G. C. Allen, "Monopoly and Competition in the United Kingdom," in Edward H. Chamberlain, editor, *Monopoly and Competition and their Regulation* (1954), p. 88 (also contains a useful bibliography at p. 108-109); John Jewkes, "British Monopoly Policy, 1944–1956," 1 *Journal of Law and Economics* 1 (1958); S. R. Dennison, "The British Restrictive Trade Practices Act of 1956," 2 *Journal of Law and Economics* 64 (1959); D. Cairns, "Monopolies and Restrictive Practices" in M. Ginsberg, editor, *Law and Opinion in England in the Twentieth Century* (1959), p. 173. C. Grunfeld, "Anti-trust Law in Britain since the Act of 1956," 6 *Amer.J. of Compar.Law* 439 (1957); A Sutherland "The Restrictive Practices Court and Cotton Spinning," 8 *J. of Ind.Econ.* 58 (1959); A. Hunter, "Competition and the Law," 27 *Manchester School* 52 (1959); J. B. Heath, "The 1956 Restrictive Practices Act: Price Agreements and the Public Interest," 27 *Manchester School* 72 (1959); J. T. Craig, "A Survey of Recent Case Law," 13 *Northern Ireland Legal Quarterly* 225 (1959). I have also had the advantage of reading unpublished papers by A. Beacham and T. Wilson.

[20] *i.e.*, "any negative obligation, whether express or implied, and whether absolute or not": s. 6 (3).

the Act does not so specify, the Registrar acts in these proceedings as something like a Public Prosecutor, in most instances thus far opposing a declaration of legality. The court must then determine whether the proponents of the agreement have met their burden of proof in establishing that it is in the public interest. Under the Act, it is presumed that a registered agreement is contrary to the public interest unless the court is satisfied under section 21 on any one or more of seven defined grounds of possible reasonableness which might justify the restriction,[21] and is further satisfied that the restriction is not unreasonable, having regard to the balance between these seven considerations and the interests of the consuming public, or those of actual or potential competitors of the respondents, not parties to the agreement. Under this Act, as of August 7, 1959, 2,200 agreements were registered, of which 600 were abandoned, cancelled, or allowed to expire. One hundred and thirty more agreements had by then been presented to the court, or were being prepared for presentation, and it was thought that their fate would govern that of 1,050 other agreements on the register. The remaining group of 400 agreements were being studied, according to the Registrar.[22]

Secondly, the Act of 1956 authorises individual enforcement of resale price maintenance agreements, and prohibits their collective enforcement, authorising the Crown, apparently in the High Court, to enforce this provision by proceedings for injunction.

Thirdly, the Monopolies Commission retains jurisdiction in cases under the 1948 Act, which are not covered by the 1956 Act. More concretely, this means that in the absence of a registrable agreement, the Commission has the power to make investigations, and to report back to the Board of Trade, when the Board asks it to determine whether the public interest is being served by an industry where one company, or any interconnected group of companies, produces more than one-third of the goods supplied to any British

[21] The famous " gateways " of s. 21 (1). They are (a) that the restriction is reasonably necessary, in view of the character of the goods, to protect the public against injury in connection with the consumption, installation or use of the goods; (b) that the removal of the restriction would deny the public " other specific and substantial benefits or advantages enjoyed or likely to be enjoyed " by them; (c) that the restriction is reasonably necessary to counteract measures taken by a person not party to the agreement, with a view to presenting or restricting competition in the parties' business; (d) that the restriction is reasonably necessary to enable the parties to deal fairly with " preponderant " suppliers or purchasers; (e) that the removal of the restriction would be likely to have a serious and persistent adverse effect on the average level of unemployment in the areas affected by the agreement or (f) to cause a reduction in the volume or earnings of a significant export business; or (g) that the restriction is reasonably required in connection with the maintenance of another restrictive agreement approved by the court. See B. S. Yamey, " Restrictive Agreements and the Public Interest: a Critique of the Legislation " [1960] *Public Law* 152.

[22] These figures come from a paper " Progress under the Restrictive Trade Practices Act, 1956 " delivered by the Registrar, Mr. R. L. Sich, before Section F of the British Association, September, 1959, and kindly made available by him in manuscript.

market, home or export. When such Reports are made, they may be laid before Parliament by a competent authority, and such recommendations by way of remedy as Parliament may approve can be carried out by the Executive. Beyond this power to act on reference in the case of particular industries, the Commission may under section 15 make general studies, at the request of the Board of Trade, such as its important study of Collective Discrimination.

And fourthly, considerable common law jurisdiction remains after the passage of these statutes—perhaps unimpaired common law jurisdiction, at least in theory, as some commentators have suggested.[23]

On the face of it, the system for investigation and enforcement established by these two statutes is not complete. It does not purport to deal with all, nor even with almost all, aspects of the economic problem of monopolisation and restraints on competition. Earlier studies, and the useful reports of the Monopolies' Commission, document significant tendencies towards monopoly and concentration of power, and widespread habits of restriction in the British economy.[24] Many of the most significant questions raised by this panorama are either exempt from both statutes, or are remitted to the Commission under the 1948 Act. Mergers, monopolisations, tying clauses, the abuse of patent rights, discriminations, arrangements in the export trade, for example, seem to be left entirely or partially in limbo, or most doubtfully be squeezed into one or the other of the statutes, by heroic construction.

Secondly, and on this point I want especially to keep Professor Higgins's bad example firmly before me, both the enforcement procedure of the Monopolies Commission and that of the Restrictive Practices Court raise serious doubts on grounds of efficacy in the light of American experience.

The complex procedure of the Monopolies Commission, as Mr. Yamey has pointed out,[25] raises difficult and embarrassing questions for the Executive, by making every attempt at action under the 1948 Act a political event. The problem of political pressure would be even more acute for members of Parliament, should the procedure be much used, for the parties in interest would naturally turn for help in many instances to members of Parliament, either as constituents or as friends. Yet a political appeal is the only possible appeal under the Act from a Report of the Commission. I cannot imagine this enforcement procedure to be a practical or satisfactory way for dealing with large numbers of problems over the long run,

[23] See, *e.g.*, Wilberforce, Campbell and Elles, *The Law of Restrictive Trade Practices and Monopolies* (1957), sections 4, 201.

[24] See D. Burn, editor, *The Structure of British Industry* (1958); R. Evely and I. M. D. Little, *Concentration in British Industry* (1960); P. E. Hart, "Business Concentration in the United Kingdom," 123 *J. Royal Statistical Society* 50 (1960); P. L. Cook and R. Cohen, *Effects of Mergers* (1958).

[25] B. S. Yamey, in "United Kingdom," *op. cit. supra*, note 19, at pp. 384–390. See also, S. R. Dennison, *op. cit. supra*, note 19, at 65.

from the point of view either of the government or of the individuals concerned. After all, private business affairs may be transformed or reorganised in the end by executive order under the 1948 Act, without an opportunity to have the evidence of the responsibility of the individuals concerned reviewed by ordinary appeal.

The judicial procedure of the Restrictive Practices Court seems more promising to an American eye.[26] Here the question in my mind is whether the standard of judgment in section 21, codifying in considerable part Lord Macnaghten's philosophy in the *Nordenfelt* case, does not require too much of the judges. Their task is not the difficult but finite one of determining whether competition has been substantially restrained, but the almost boundless question whether such restraints, when established, are in the public interest. It is already clear under section 21 that the court will consider whether prices are "too" high or "too" low during the period being studied.[27] The American courts have consistently said that they would not and could not make such determinations, since prices which seemed reasonable today might become unreasonable tomorrow, so long as the power to fix them survived.[28] How the competing values of section 21 are to be balanced by the court is not yet clear. Several observers have commented that the range

[26] Much of the objection to action by the Monopolies' Commission under the vague formulae of the 1948 Act is cured by the more specific definition of legislative policy in the 1956 Act. A good deal of the debate as to whether it is constitutionally appropriate or politically wise to delegate "policy-making" functions to the Judiciary, or to an administrative tribunal, derive from the fact that the 1948 Act was essentially one to authorise investigation, not a statement of policy, such as that through which the Congress delegated enforcement responsibility to the judges under the Sherman and Clayton Acts, and the comparable delegation by Parliament in the 1956 Act. The debate is also featured, however, by traces of the ancient popular myth that judges do not "make," but only "find" the law, and that they should not be concerned with issues of "policy," as distinguished from "law." The naïveté of such views does not require comment. Experience in this as in other fields of legislation confirms that direct action by government departments is an almost unworkable procedure for carrying out policies of this kind, and that either administrative or judicial methods are almost indispensable if a legislative programme is to be consistently and fairly applied to a wide range of complex factual situations.

[27] *Re Yarn Spinners' Agreement* [1959] 1 All E.R. 299; L.R. 1 R.P. 118, for example, does not finally clarify whether the agreement was held illegal because all minimum price-fixing is a statutory detriment; because the minimum prices actually set in this case were actual prices, higher than they would otherwise have been; because the minimum prices were calculated in accordance with a formula which the court regarded as yielding an "artificial figure calculated on a hypothetical average cost" (p. 312), and not a genuine stop-loss scheme which might have been acceptable (p. 313); or because the prices fixed were in some sense "too" high, or at least higher than they would have been in a free market (p. 314). See also *Re Water-Tube Boilermakers' Association's Agreement* [1959] 3 All E.R. 257; L.R. 1 R.P. 285, 335, 341, *Re Blanket Manufacturers' Agreement* [1959] 2 All E.R. 1; L.R. 1 R.P. 208; *Re Wholesale and Retail Bakers of Scotland Association's Agreement* [1960] L.R. 1 R.P. 347.

[28] *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Kiefer-Stewart Co.* v. *Joseph E. Seagran & Sons*, 340 U.S. 211 (1951).

of choices open to the court under section 21, and the comparable range of choices open to the Commission under section 6 of the 1948 Act, are so much a matter of discretion, that no case can become a precedent for any other case under either statute, and that no rational co-ordination of the enforcement policy of the law could be achieved by appellate review.

Risks of this kind may not materialize if the lead of some of the early cases decided by the Restrictive Practices Court is pursued. These crisp and vivid judgments, especially that in the *Yarn Spinners* case, are in the finest style of British statutory interpretation, and represent the common law instinct for policy at its vigorous best. But the *Boilermakers'* case has somewhat fudged the line marked out by the *Chemists' Federation* and *Yarn Spinners*.[29] And there is no *a priori* ground to suppose, until the higher courts have spoken, that the presumption of illegality under section 21, the weight to be given by its last paragraph to the public interest in price competition, and the extent of the respondent's burden of proof, will have the all but conclusive force given them in *Yarn Spinners*.

Suppose, however, that this should turn out to be the case. What then? Let us suppose, that is to say, that most registrable agreements are found on inquiry to be against the public interest. Suppose that the custom of making open agreements for the self-regulation of competition is substantially weakened in British business practice. Would that result solve the problem to which the statute is addressed and substantially increase the degree of competition in the British economy?

Economic studies indicate that in many British industries the degree of concentration is quite as high as in the American economy, and that in important sectors a large part of market supply is offered by not more than three, four, five or six firms.[30] By reason of their small number, these firms have a considerable capacity to avoid price competition, by finding forms of co-operation, without open collusion which could permit each competitor to guess with some assurance as to the policy of his rivals, and as to his rivals' response to a move of his own. The British people have earned, and deserve, an enviable reputation for respecting the law. But would a group of oligopolists violate the law, in such circumstances, if they gave up their older agreement, and fell back on one or another of the familiar patterns of loose but effective oligopoly co-operation? They might use direct price leadership, announced lists, basing-point practices, statistical exchanges, customary discounts, or other common means for minimizing uncertainty.[31] Or equally, would

[29] *Re Chemists' Federation Agreement* (No. 2) [1958] 3 All E.R. 448; L.R. 1 R.P. 75, and cases cited in note 27, *supra*. See B. S. Yamey, "Water-Tube Boilers: Contradictions and a Paradox," 23 M.L.R. 79 (1960).

[30] See studies referred to in note 24, *supra*.

[31] See, for example, "Restrictions off the Register," 195 *Economist* 267 (April 16, 1960), reporting on the development of "open-price" plans.

they be violating the present law if mergers brought the number of companies in a market down to the level which would make co-operation of this kind irresistibly tempting, without the formality of agreement?

Before such a development, the law could take two lines. By interpreting section 6 of the 1956 Act broadly, it could move to find registrable as "arrangements," or as "trade association recommendations," "express or implied," a wide variety of intangible but effective techniques for organising and disciplining the modes of competition in markets "of the few." Alternatively, the courts could refuse jurisdiction under the 1956 Act for a considerable class of such problems, on the ground that they involve arrangements too impalpable to be registered, and remit them either to the Monopolies' Commission, if they could be reached under the 1948 statute, or to effective immunity if they cannot be so reached.

But can the British law as now framed undo mergers, or break up monopolies or near-monopolies, if found to be against the public interest? Section 14 of the 1948 Act seems to include in its definition of the public interest "all matters which appear in the particular circumstances to be relevant" to the following issues, among others: the most efficient and economical possible production at prices which best meet requirements; the organisation of industry and trade in such ways as best encourage progressive increases in efficiency and new enterprise; the fullest use and best distribution of resources, the development of technical improvements, expansion, and the opening of new markets. Section 7 gives the Commission an apparently comprehensive power to make recommendations for action to be taken "to remedy or prevent any mischiefs which result or may be expected to result" from *Conditions* or acts found to be against the public interest, "whether under this Act or otherwise," by public authority or by the parties. But section 10, enabling a competent authority to make orders "for the purpose of remedying or preventing any mischiefs which in their opinion result or may be expected to result" from conditions found to be against the public interest, appears to be much more limited. The five operative subsections of section 10 (2) deal with the enforceability of agreements or arrangements, withholding goods, preferences and tying clauses, and there is no catch-all clause that might give section 10 the same scope as section 14. It would appear that "orders" under the 1948 Act are more narrowly confined than the "recommendations" made possible by section 7.

The distinction has not so far been of importance in the circumstances of particular investigations. And in any event, such recommendations, whether for action under section 10 or otherwise, would require special legislation before they could be made effective, situation by situation.

Whether the present statutes provide even a theoretical remedy

against mergers, monopolies or near-monopolies, it is difficult to see how they would permit either the court or the Commission to deal with some of the most pressing problems of oligopoly, which are among the most important economic aspects of the monopoly problem in all modern economics.

A large part of the litigation under the Sherman Act has been concerned with problems of this kind—that is, with determining whether a given plan or pattern of action in a market of the few was in fact a collective programme which significantly interfered with the price mechanism. These cases were often difficult to decide, for the programmes in question frequently had other purposes or effects, and they were defended by the same anthology of bad but plausible economic arguments which have bombarded the Monopolies Commission, the Restrictive Practices Court, and the High Court. But the task of the American courts under the Sherman Act is finished when they find a concert of action which can be brought within reach of section 1 of the Sherman Act as a combination, and found to constitute a significant limitation on competitive conditions. With these questions in mind, the American courts have studied plans for disseminating statistics, joint buying and selling arrangements, programmes requiring the public announcement of prices, or adherence to announced prices, basing point price plans, and other devices and arrangements which may reduce the effective number of sellers or the independence of their price policies.

Even if such situations could be brought within reach of either British statute in the absence of fairly clear-cut agreements, would the statutory criteria of the public interest suffice? Patterns of market behaviour of this kind affect not only the short-run implications of the monopoly problem—whether prices and output are higher or lower than they would be under competition—but the infinitely more important long-run consequences of monopoly, in its generic sense: the entry of new firms, and the rate of growth of old ones; the pace of innovation; and the strength of economic incentives to adopt cost-reducing changes in technique and in management. I am inclined to guess, for example, that the greatest sin of co-operative oligopolies, in America at least, during the post-war period, has been a tendency to keep prices too low, rather than too high. Economic "statesmanship," the pressure of public opinion and of labour relations, the admonitions of ministers, and a strong long-run economic interest in discouraging the entry of rivals, have all combined to lead such groups to price "moderation," as it is called. Such policies might well meet with the approval of the Monopolies' Commission and the Restrictive Practices Court, if they could be brought before it. But in the long run they would distort the flow of capital, and affect the rate of growth of the economy in ways which may do very great damage, indeed.

IV

To what conclusions does this comparison lead? Both legal systems now face the same series of problems—difficult, interesting, and important problems of economic and of social policy. They include issues of efficiency in the short-run and long-run use of resources, issues of fairness in opportunity, issues of political principle in the dispersal of power. Each system has approached these problems differently, despite the fact that we shared the common law of the subject and all that went into it. Differences in experience, differences in opinion, differences in intellectual climate have affected the course of events. The contrast offers an intriguing subject to the historian and theorist of law, and to those interested in observing the many-sided interaction between law and the society it serves and helps to govern.

I doubt whether comparative studies of this kind should be considered a final stage in the quest for law reform. They can be of value, rather, in helping to formulate the issues, in distinguishing the relevant from the irrelevant, and in achieving a clearer definition of ends and of means. And they should help to identify the problems on which more knowledge is needed before change within each system according to its own genius can and should be undertaken.

This, I take it, is one of the justifications for the academic study of social policy.

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* Professor of Law and Dean of the Law School, Yale University; during the academical year 1959–1960, Fellow of King's College and Pitt Professor of American History and Institutions, Cambridge. This paper is a revision of a lecture given December 1, 1959, at the London School of Economics and Political Science, University of London, and developed through several drafts, under the hospitable pressure of speaking engagements at Birmingham, Cambridge, Belfast, and Bristol. I should like to express my gratitude to my hosts on these agreeable occasions, both for their kindness, and for requiring me to consider some familiar problems in what was for me an unfamiliar and revealing context.

THE EICHMANN CASE

THE Israeli announcement that Karl Adolph Eichmann was to stand trial in Israel for his part in the liquidation of the Jews during the Second World War raises ethical, political and legal problems.

It may well be that Israel has many moral grounds for seeking justice against this "enemy of the Jewish people." This paper will not, however, examine such claims, nor is it concerned with the Security Council discussion of the Argentine-Israel dispute consequent upon Eichmann's removal from Argentina and his transportation to Israel. It is true that the speeches in the debate were full of legal argument, with constant reference to the rights of both states in international law, and with some representatives expressing the view that the Israeli apology constituted sufficient reparation. The vote of the members of the Council, however, was not based on legal considerations. The Security Council is a political body, not a court of law. Its members are states represented by political officials who cast their votes in accordance with the instructions they receive from their foreign offices, and these instructions are based on the political motivations of the state concerned.[1] Similarly, it was political convenience which led Israel and Argentina eventually to announce that, in accordance with the resolution of the security council, they regarded the incident as closed.

In this paper only two aspects of the legal problems involved will be examined. First, there is the issue of the forcible removal of an individual from one state in order that he may stand trial in the territory of another. Secondly, there is the question of the claim by a state to exercise jurisdiction over an alien for crimes committed abroad against individuals who did not possess the nationality of the state which seeks to try the alleged criminal.

ABDUCTION

International law recognises that every state is completely sovereign within its own territory. This sovereignty, normally speaking, is only limited by treaties regulating specific issues, or by customary law concerning such matters as the immunity from jurisdiction of diplomatic representatives or foreign state organs. A state is therefore entitled to give asylum to those who seek it, or to admit only such aliens as it may feel inclined to allow into its territory. Generally, asylum to an alleged fugitive criminal is only restricted in accordance with the terms of an extradition treaty between the

[1] See, *e.g.*, the Joint Dissenting Opinion on *Admission of a State to Membership in the United Nations*, *I.C.J. Reports 1948*, p. 82, at p. 85.

state of refuge and the demanding state,[2] or by a specific agreement, such as that relating to the surrender of named war criminals after the Second World War.[3] Similarly, it is only when special agreements exist that aliens are admitted into a state without visas.[4] Even then, the states concerned normally retain the right to exclude any intending visitors whom they consider to be undesirable.

When private individuals smuggle their way into a foreign state they may well be breaking that state's laws, but their action does not involve the international responsibility of their home state. If, on the other hand, the aliens were acting with the connivance or on the initiative of their home state, the international responsibility of that state would be involved if any breach of the local law was intended to be the result of the incursion. It is obvious, of course, that the kidnapping of a national, or of a refugee alien, would constitute such a breach of law. In the latter part of the nineteenth century and during the early years of the twentieth century such kidnappings were not unknown between the United States and Mexico and even between the United States and the United Kingdom.[5] Perhaps the most famous of such international kidnappings is that of Herr Jacob-Salomon by German agents from Switzerland in 1935.[6]

Should the kidnapping be purely the result of private enterprise, the state from which the individual had been abducted would have to seek its remedy by requesting the surrender of the kidnappers from the state to which they had gone, and at the same time to request the return of the victim. There would be a legal obligation to surrender the kidnappers only if there were an extradition treaty, specifying kidnapping as an extraditable crime, between the two countries concerned.[7] In so far as Eichmann is concerned, it must be pointed out that although an extradition treaty has been signed between Israel and Argentina, it has not been ratified and therefore does not apply. Even if it were to be ratified today, it is likely that it would be clearly provided by the two states that the treaty was not retroactive so as to apply to offences committed before it came into effect.

[2] See Green, "Recent Trends in the Law of Extradition," 6 *Current Legal Problems*, 1953, p. 274.

[3] See Resolution of the General Assembly, adopted unanimously, February 13, 1946 (H.M.S.O., *History of the United Nations War Crimes Commission*, 1948, p. 411) and that of October 31, 1947, adopted by 42 votes to 7 (*ibid.*, p. 413); also Green, p. 289.

[4] Exchange of Notes, October 1, 1958, between the governments of the United Kingdom and Morocco for the mutual abolition of visas and passports, Cmnd. 633 (1959).

[5] Some of these cases are discussed in Hackworth, *Digest of International Law*, 1941, vol. 2, pp. 309–312 and 320.

[6] Preuss, "Kidnapping of Fugitives from Justice on Foreign Territory," 29 *American Journal of International Law*, 1935, p. 502.

[7] See *e.g.*, comments by United States Supreme Court in *Ker* v. *Illinois* (1886) 119 U.S. 436. See, further, the refusal of an Argentine court to extradite Jan Durcansky as there is no treaty between Argentina and Czechslovakia, *The Times*, July 22, 1960.

In the event of there being no extradition treaty between the states involved, it is a matter of discretion, sometimes described as comity, for the addressee of the demand to decide whether to comply with the request or not. Should the kidnappers be aliens, difficulties will arise. Normally, expulsion orders against aliens are effected by returning the aliens concerned to the state of which they happen to be nationals, and this will probably not be the state from which they removed their victim. If the kidnappers have returned to their home state, the addressee may be completely unable to comply with the request if no extradition treaty exists. It is not usual for a state to be able to deport its own nationals—in fact, many extradition treaties expressly so provide [8]—and any attempt to do so would probably result in proceedings similar to habeas corpus.

The victim of the kidnapping would himself not be protected by an extradition treaty, for this only applies to the surrender of an alleged fugitive from justice. There might be an obligation upon the state to which the victim has been brought to rescue him from his kidnappers. This does not mean, however, that there is an obligation to return him to the country from which he has been brought. In fact, after he had been "rescued" he would be liable to arrest and trial in the country in which he now finds himself. In *Ex p. Elliott* an attempt was made by the applicant, a deserter who had been arrested in Brussels by British military police in the presence of Belgian police officers, to secure his release on habeas corpus on the ground that he had been wrongly arrested. Lord Goddard dismissed the application, pointing out that "if a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear . . . he is charged with an offence against English law, the law applicable to the case. . . . We have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may have been brought here" [9]

The situation is entirely different when marauders operate at the instance of their state, or are on a mission from their state. Here it must be remembered that in his first statement after it became known that Eichmann was in Israel, Prime Minister Ben-Gurion claimed personal credit for the operation. Later, he disclaimed all personal knowledge and described the affair as one of purely private initiative.

An invasion by state agents, whether by force of arms or not, of the territory of another state constitutes a breach of the sovereignty of that state and involves the responsibility of the state of which the offenders are agents. In the cases referred to above

[8] See United States-German Extradition Treaty, 1930, Art. 3, and *Valentine* v. *U.S., ex rel. Neidecker* (1936) 299 U.S. 5, for a discussion of a similar provision in the United States-French Extradition Treaty, 1909.

[9] [1949] 1 All E.R. 373, at pp. 376, 377.

between the United States and Mexico, as well as in the Vincenti case between the United States and the United Kingdom in 1920,[10] the normal practice was to terminate the proceedings against the kidnapped offender and, as a matter of comity, often to offer to return him to the state from which he had been brought and to extradite the kidnappers in accordance with the treaty, if their extradition should be requested. In 1886, however, the United States Supreme Court made it clear that protests against the exercise of jurisdiction arising from a kidnapping could not be made by the accused, but would have to be made by the state which considered itself wronged.[11]

Where an extradition treaty does exist, and the addressee declines to comply with the demand made upon it, or if it ignores the protests made when no treaty exists, the offended state may consider referring the matter to the International Court of Justice. The difficulty here is that the Court only possesses compulsory jurisdiction if the two states involved have accepted its jurisdiction by reason of declarations made under the "Optional Clause" (Article 36) of the Statute of the Court. While Israel has made such a declaration, Argentina has not. It would therefore be necessary for the two states to come to an express agreement to submit the case to the Court. In accordance with its Statute, the Court would be able to issue the equivalent of an injunction against Israel in the form of an Order prescribing interim measures of protection[12] and, by way of final judgment, could order the return of the kidnapped individual in order to re-establish the *status quo ante*, which is the normal purpose of international judicial process when a tort has been committed.[13] If, as a result for example of an execution carried out consequent upon a judicial sentence, the return of the fugitive were no longer possible, the Court could order reparation by way of damages instead.[14]

What has been said so far ignores the possibility that the state from which the abduction had taken place might itself have been in default. At the end of the Second World War the Government of Argentina announced its willingness to surrender for trial any Axis or Fascist war criminals seeking asylum within its territory.[15] In June 1960, however, Argentina declined to surrender such an individual at the request of the German Federal Republic.[16] One

[10] Hackworth, *loc. cit.*, p. 320.

[11] *Ker* v. *Illinois*, 119 U.S. 436—the accused had been kidnapped in Peru by a United States marshal.

[12] Statute, Art. 41.

[13] *Chorzów Factory Case* (1928), Permanent Court of International Justice, Series A, No. 17: "Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed" (p. 47).

[14] See Schwarzenberger, "Fundamental Principles of International Law," 87 *Hague Recueil*, 1955, p. 195, at pp. 353–354.

[15] *The Times*, February 8, 1945.

[16] *Ibid.*, June 9, 1960. See, also, the refusal by Judge Issaurale to order the extradition of Durcansky to Czechoslovakia, *ibid.*, July 22, 1960.

cannot ignore the fact that Germany was not a party to any such agreement, nor for that matter was Israel—unless it can be argued that it has succeeded to British rights in this connection. However, the undertaking was general, and intended to ensure that such offenders did not evade justice.

Jurisdiction

What has been described as Hitler's "final solution" of the Jewish problem has frequently been called genocide, and some of those who have commented on the Eichmann case have accused him of having committed this offence. Yet others have said that it was only because he had disappeared that he was not among those indicted before the International Military Tribunal at Nuremberg. The latter forget that Bormann was tried before that court *in absentia*, so that mere non-availability would not have inhibited jurisdiction. The accused at Nuremberg were the "Major War Criminals of the European Axis" "whose offences have no particular geographical location."[17] Eichmann's crimes had a definite location and were primarily committed at Auschwitz[18] so that, on this ground too, he was not strictly eligible for trial before this Tribunal.

As regards genocide, it was not until the General Assembly of the United Nations drew up its Convention in December 1948,[19] that an authoritative definition of this offence was evolved. Both Argentina and Israel have ratified the Convention and, by Article 7, it was agreed that genocide was not a political crime and, therefore, "the Contracting Parties pledge themselves in such cases to grant extradition *in accordance with their laws and treaties in force.*"[20] Even had there been such an extradition treaty in existence between the two countries, Israel would not have possessed jurisdiction to try Eichmann under the Convention. By Article 6 "persons charged with genocide . . . shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with regard to those Contracting Parties which shall have accepted its jurisdiction." The *locus* of Eichmann's alleged offences was certainly not the State of Israel, and, so far, there is no international penal tribunal in existence.

To reject this basis of jurisdiction against Eichmann does not amount to saying that Israel is unable to try him. In accordance

[17] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, August 8, 1945, Art. 1 (Cmd. 6903—1946).

[18] For an objective account of conditions in Auschwitz, see Castle, *The Password is Courage*, 1954, pp. 158 *et seq.* (The personal record of a British Warrant Officer.)

[19] Res. 260-C (III), December 9, 1948. See Robinson, *The Genocide Convention*, 1960, p. 146.

[20] Italics added.

with the normal principles of territorial jurisdiction, a state is entitled to exercise its jurisdiction over any person, alien or national, who has offended against its criminal law.

It has sometimes been said that a state is not competent by international law to try an alien for an offence committed abroad. Such an argument in so far as Eichmann is concerned is irrelevant. International law, in the absence of a treaty expressly creating individual rights, only recognises the rights of states.[21] To try an alien in circumstances alleged to infringe international law would constitute a wrong, not against the alien as such, but against the state of which he is a national. The theory of international law in such cases is that the wrong suffered by the alien is in fact an injury to his home state. It has never been suggested that Eichmann has given up or lost his German nationality. The only state, therefore, entitled to protest against the exercise of jurisdiction would be Germany. Israel only recognises the Federal Republic as a state and so the protest would have to come from Bonn. Far from the Federal Government showing any intention to lodge such a protest, the West German authorities have made known their complete willingness to tolerate a trial and to co-operate in any way that they are able.

In the normal course of events, a state will only try an alien for an offence committed abroad if the effects of the offence have been felt in the territory of the state seeking to exercise jurisdiction,[22] or if it is one of its nationals who has been the victim of the crime.[23] It has also been generally accepted that a state is entitled to try captured military personnel for war crimes committed against its nationals in enemy or allied territory and, in these circumstances, states even claim the right to exercise such jurisdiction if the victims possessed the nationality of their allies.[24]

It is, of course, possible for a particular state to pass special legislation to give its courts jurisdiction over aliens within its territory if they have committed any, or specific, offences abroad. In such cases, the state concerned runs the risk of finding itself charged with a breach of international law by the state of which the alien is a national as soon as the attempt is made to bring the accused to trial.[25] Legislation of this kind has in fact been passed in Israel. By this, authority is given to Israeli courts to try any Nazi or other person who, during the Second World War, "committed

[21] See *Molvan* v. *Att.-Gen., Palestine* (*The Asya*) [1948] A.C. 351.

[22] See *R.* v. *Godfrey* [1923] 1 K.B. 24, and *Joyce* v. *D.P.P.* [1946] A.C. 347.

[23] See Art. 6 of Turkish Penal Code, 1926: "Any foreigner who . . . commits an offence abroad to the prejudice . . . of a Turkish subject . . . shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey."

[24] *e.g.*, *The Peleus Trial*, 1945, before a British war crimes tribunal, Cameron, *The Peleus Trial*, 1948.

[25] See the Cutting incident, United States and Mexico, 1886, Moore, *Digest of International Law*, 1906, vol. 2, pp. 228 *et seq.*

crimes against the Jewish People." Israeli courts must, like those in the United Kingdom, take the law as they find it. It is not part of their function to examine the policy behind the law or to assess the reasons which motivated the legislature in enacting such a law. From their point of view, therefore, jurisdiction over Eichmann would exist.

Although the decision of the Permanent Court of International Justice in *The S.S. Lotus* case,[26] 1927, has come in for much criticism on its application to the facts involved, and has now been dissented from in Article 11 of the 1958 Geneva Convention on the High Seas, it is still accepted on the general points of international law, particularly those concerning sovereignty, which were considered in the judgment. It has never been questioned, for example, that "restrictions upon the independence of states cannot be presumed. . . . Jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory. . . . It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed states to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, *every state remains free to adopt the principles which it regards as best and most suitable.* . . . In these circumstances, all that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."[27] In other words, broadly speaking, unless there is a clear rule of international law forbidding a state from pursuing a particular line of conduct, it is allowed to act in this way if it wishes.

There is at present no rule of international law forbidding Israel from trying Eichmann since he is at present in Israel. It may well be, however, that the legislation conferring jurisdiction upon the Israeli courts shows certain departures from traditional concepts of criminal jurisprudence. In the past, criminal jurisdiction has normally depended upon the presence of the accused at the time of

[26] Series A, No. 27.
[27] At pp. 18–19 (italics added).

the commission of the crime; or the nationality of the victim being that of the state exercising jurisdiction; or the accused possessing the nationality of that state; or the effects of the crime being felt within that state; or the accused having committed war crimes within the territory or against the nationals of an ally of the trying state; or on some other factor linking the accused or his offences with the state seeking to try him. In the Eichmann case, none of these tests, with the possible exception of the last if interpreted extensively, exists. The accused is an alien, who committed his offences abroad at a time before the state intending to try him had come into existence. Since Israel did not yet exist, it is difficult to assert that occupied territories in Central Europe were the territories of its allies. It is even more difficult to maintain that the victims possessed its nationality.

The problem of the nationality of claims[28] is one of the most important in the sphere of international responsibility and reparation for international torts. Basically, a state is only permitted to act on the international level on behalf of its own nationals. The right to act on behalf of deceased aliens is not one of the recognised exceptions to the nationality rule.[29] It is generally recognised that the individual who has suffered a wrong involving international responsibility must have possessed the nationality of the claimant state at the time of the injury. While there is no clear agreement as to how long this nationality must continue, there seems little doubt that it must still exist at least at the time that the claim is brought. If nationality is essential for a civil action to be brought by one state against another, there is even stronger ground for asserting that there must be some sort of nationality or *locus* link to permit criminal proceedings against an alien for an offence abroad. Since this tends to reflect the undefended position of stateless persons, it ought also to apply to those who died before the claimant state came into existence.

If the Israeli exercise of jurisdiction is in breach of international law, it is not Eichmann who is entitled to make the protest. International representations may only be made by states. The states in which the crimes were committed, especially Poland, and those of which the victims were nationals, have none of them protested at the Israeli claim to exercise jurisdiction. Further, none of them has really tried to secure the presence of Eichmann in order to bring him to trial. The right of Israel to link itself with the victims of the crimes may be somewhat tenuous in strict law, being based on the ground that, since Israel is a Jewish state created largely as a result of international sympathy arising from the Hitlerite persecution, Israel is entitled to represent Jews who have no nationality or who were the victims of Nazi oppression—a claim

[28] See, *e.g.*, Hurst, *Collected Papers*, 1950, p. 88, and Schwarzenberger, *International Law*, vol. 1, 1957, pp. 590–602.
[29] Schwarzenberger, *ibid.*, pp. 592–596.

that has been recognised by the Federal Republic of Germany [30] —even though they might have died as Polish citizens while Israel was still a British mandated territory. Nevertheless, if Israel had not expressed willingness to institute proceedings against him Eichmann would have got away scot free.

It would appear, therefore, that, in law, despite the appearance of the Israeli measure being an instance of retroactive criminal legislation, it is neither contrary to international law nor to the general principles of law recognised by civilised nations. The only action that may appear to be outside the law is the method by which the accused was obtained. As has been indicated, however, if the kidnappers were private individuals indulging in private enterprise, no international responsibility arises. If they were state representatives, then, should Israel decline to surrender Eichmann or his captors, any claim by Argentina could be expiated in the form of liquidated damages, but no such claim, it would appear, is likely to be lodged.

L. C. Green.*

[30] Agreement between Israel and the German Federal Republic, September 10, 1952 (*Documents*, Jerusalem, 1953; or German *Bundesgesetzblatt*, 1953, II, p. 37). See also Bentwich, "International Aspects of Restitution and Compensation for Victims of the Nazis," 32 *British Yearbook of International Law*, 1955–56, p. 204, and Robinson, "Reparation and Restitution in International Law as Affecting Jews," 1 *Jewish Yearbook of International Law*, 1948, p. 186.

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HIRE-PURCHASE AGREEMENTS AS BILLS OF SALE (II)

(*Continued from* p. 409)

In the first part of this article the meaning of "bill of sale" and the effect of the Bills of Sale Acts, 1878 and 1882, were described. The stage is now set for a discussion of how far, if at all, the Bills of Sale Acts apply to hire-purchase agreements.

Part II: Hire-Purchase Agreements

It is clear that there are important similarities between the position under a security bill of sale and the position under a hire-purchase agreement. In both, the person in possession of the goods is not the owner, although he may appear to be the owner to the outside world. In both, the person in possession is under an obligation to pay money to the owner of the goods. In both, the owner is entitled to take possession of the goods if default is made in payment.

But these similarities do not bring the hire-purchase agreement within the Bills of Sale Acts, for those Acts, as we have seen, are concerned not with factual situations but with documents of a certain type. "The Bills of Sale Act relates to assurances or assignments or rights to seize given or conferred *by the person who owns the property*." [1]

The essential facts of the hire-purchase agreement which distinguish it from a bill of sale are these: the owner's title to the goods is independent of the hire-purchase agreement, and necessarily arose before the hire-purchase agreement was entered into; the hirer's right to possession of the goods arises solely out of the hire-purchase agreement; and the owner's right to recover possession is a right against his own goods, and does not arise out of the hire-purchase agreement.[2] Under a bill of sale, on the other hand, the grantee's title to the goods stems from the bill of sale itself, since the goods were originally the property of the grantor, who remains in possession of them.

In *McEntire* v. *Crossley Brothers, Ltd.*: [3]

> S agreed to sell [4] a gas engine to B, payment to be made by

[1] *Per* Lord Herschell L.C. in *McEntire* v. *Crossley Brothers, Ltd.* [1895] A.C. 457, H.L., at p. 462. (Italics added.)

[2] See, *e.g.*, *Smart Brothers, Ltd.* v. *Holt* [1929] 2 K.B. 303, D.C., especially *per* Wright J. at p. 308; and *Bowmakers, Ltd.* v. *Barnet Instruments, Ltd.* [1945] K.B. 65, C.A.

[3] [1895] A.C. 457, H.L.

[4] The agreement was drafted as a hiring agreement, but it was clearly a conditional sale of goods as in *Lee* v. *Butler* [1893] 2 Q.B. 318, C.A. See *per* Lord Herschell L.C., [1895] A.C. at pp. 465-466, and Lord Watson at p. 467.

instalments. The property was to remain in S until all instalments had been paid, and S was entitled to recover possession on B's default. On B's bankruptcy S claimed to recover the engine. B's trustee in bankruptcy claimed that the transaction was a void bill of sale.

The House of Lords unanimously held that the transaction was not a bill of sale, and that S was entitled to recover the engine, since B had never become the owner of the goods and therefore could not have granted a bill of sale in respect of them.

Although the agreement in this case was a contract for the sale of goods where the property did not pass to the buyer until payment of the last instalment, *a fortiori* similar principles must apply to the ordinary form of hire-purchase agreement where the property does not pass to the hirer until he exercises the option to purchase the goods.

Sale and Lease Back

It is hardly surprising that persons lending money on the security of goods seized on the principle in *McEntire* v. *Crossley Brothers, Ltd.*[5] to concoct a transaction which would evade the Bills of Sale Acts, which were unpopular with lenders because of the technicalities which might unwittingly be infringed and with borrowers because of the stigma which undeniably attached to grantors of bills of sale. If B[orrower] wishes to borrow money from L[ender], giving L a right to seize B's goods on B's default in repayment, why not arrange for B to sell his goods outright to L for the money needed by B? Of course, B wishes to continue to use his goods, and to regain their ownership on repayment: this can be achieved by L immediately entering into a hire-purchase agreement[6] whereby B hires the goods, the hire-purchase price amounting to repayment of the original sale price with interest added. If B defaults in repayment, L will enforce, not a loan on the security of goods, but his rights as owner under a hire-purchase agreement.[7]

If it is not surprising that this transaction was attempted, it is still less surprising that the courts were not deceived by the procedure. "I do not deny," said Lord Esher M.R. in a leading case, "that people may evade an Act of Parliament if they can, but, if they attempt to do so by putting forward documents which affect to be one thing when they really mean something different, and which are not true descriptions of what the parties to them are really doing, the court will go through the documents in order to arrive at the truth."[8] "The court ought never to let a sham document,

[5] [1895] A.C. 457, H.L.

[6] Or a conditional sale agreement: the principles to be discussed apply equally to both types of transaction.

[7] Similar transactions had, indeed, for different reasons, anticipated the Bills of Sale Acts. See *Cooper* v. *Willomatt* (1845) 1 C.B. 672 (C.P.).

[8] *Re Watson* (1890) 25 Q.B.D. 27, C.A., at p. 37.

drawn up for the purpose of evading an Act of Parliament, prevent it from getting at the real truth of the matter." [9]

The present state of the law has been well summarised by Maugham L.J. in the following words: "One does not merely look at the form of the document. . . . The true nature, not the form of the transaction, must be regarded, and if the document itself is only a cloak for what is really a mortgage of chattels . . . the form may be disregarded. . . . Whether a transaction purporting to be a sale and purchase of goods [10] is no more than it appears to be on its face, or whether it really is a loan on security, and therefore a document which might be hit by the Bills of Sale Acts, is a question to be determined by ascertaining the true intention of the parties. That true intention may appear . . . from the document itself, because although it uses the language of sale and purchase, it may very well on its mere words appear to be nothing other than a loan on security, or it may appear from any collateral agreement or other document which would show that the true intention was a loan on security, or finally the fact might be ascertained by parol evidence. . . ." [11]

Thus a lender of money cannot evade the Bills of Sale Acts merely by dressing up a transaction, which is in reality a loan on the security of goods, in the guise of a sale followed by a repurchase or hiring back. On the other hand, if the true intention of the parties is to sell goods and then to resell them or hire-purchase them to the original owner, the courts will uphold the transaction.

Rationale of the Power to Disregard the Form of the Documents

Although it is now well established that the courts can go behind a document in the form of a hire-purchase agreement in order to ascertain the true intention of the parties, there are powerful arguments which might be put to show why this should not be possible. They may be summarised in this way:

1. A hire-purchase agreement is a document by which the owner of goods grants another, the hirer, certain rights in respect of the

[9] *Ibid.*, at p. 33.

[10] Or, of course, a hire-purchase agreement.

[11] *Re Lovegrove* [1935] Ch. 464, C.A., at pp. 495–496. In some American States a similar problem has arisen in distinguishing between a conditional sale agreement and a chattel mortgage; here, too, the emphasis has generally been on "the ruling intention of the parties" (*per* Strong J., *Herryford* v. *Davis* (1880) 102 U.S. 235, 244; 26 Law Ed. 160, 162, U.S. Sup. Ct.). For an account of the difference in effect between the two transactions in one State (Washington), *see* Starr, "Conditional Sales and Chattel Mortgages" (1934) 9 Wash.L.Rev. 143, 183. Two notes on the question of distinguishing are: "Distinction between a Conditional Sale and a Chattel Mortgage" (1923) 36 Harv.L.Rev. 740; similar title, (1929) 14 Iowa L.Rev. 329. For the American cases, see 17 American Law Reports Annotated (A.L.R.), pp. 1427–1433; 43 A.L.R. 1252–1257; 92 A.L.R. 311–321; 175 A.L.R. 1374–1382. See too Gilmore and Axelrod, "Chattel Security" (1948) 57 Yale L.J. 517 and 761, where this topic is mentioned shortly at p. 542.

goods, namely, the right to possession so long as the hiring lasts, and the right to buy the goods if certain conditions are fulfilled. Thus, while the grantor of the document *is* the owner of the goods,[12] "it certainly was not given by way of security for the payment of money by them."[13] In other words, the "grantor" of a hire-purchase agreement is the lender, not the borrower.

2. The hire-purchase agreement by itself cannot therefore be a bill of sale. The grantor of a bill of sale by way of security is the borrower, and we must therefore look to the prior stage of the transaction, whereby the borrower divested himself of the ownership of the goods in favour of the lender. But very often in these cases we find that the sale of the goods by borrower to lender is verbal, and not recorded by any document. As we have already seen, a verbal transaction is not caught by the Bills of Sale Acts, and even though the sale may be expressly or impliedly on condition that the seller is to retain possession of the goods there is nothing registrable at that stage of the transaction.

3. Neither stage of the two-stage transaction can be regarded as a bill of sale in itself. Can both stages be taken together as a single transaction, so that the document recording that transaction, or a part of it, is to be treated as a bill of sale? We have seen the importance of the rule of evidence that "where there is a document expressing the agreement between the parties, parol evidence of their agreement cannot be given,"[14] so that one party cannot give parol evidence of the agreement and ask the court to disregard the written document on the ground that it is otiose. But, once the written document is before the court, evidence may be given that it does not represent the true agreement between the parties. Although this is the basis of the court's intervention, how is it possible to hold that a document which, by itself, is not a bill of sale becomes a bill of sale because it is part of a larger transaction, which it does not purport to record?

A plausible explanation, and the only one ever attempted by the courts, is to be found in some of the cases. In *Cochrane* v. *Matthews*,[15] C lent £50 to M. There were two documents: (1) an inventory of the furniture in M's house, ending: "Received of C the sum of £50, for the absolute sale to him of the whole of the above-mentioned articles of furniture and other effects. (Signed) M."[16]; (2) a memorandum of an agreement whereby C agreed

[12] *Cf.* Lord Herschell L.C. in *McEntire* v. *Crossley Brothers, Ltd* [1895] A.C. 457 at p. 462, cited above, p. 516.

[13] *Per* Lord Herschell in *Manchester etc., Ry.* v. *North Central Wagon Co.* (1888) 13 App.Cas. 554, H.L., at p. 561.

[14] *Per* Lindley L.J., *Newlove* v. *Shrewsbury* (1888) 21 Q.B.D. 41 at p. 45: see above, p. 404.

[15] (1878) 10 Ch.D. 80n., Ch.Div.

[16] The Bills of Sale Act, 1878, s. 4, which included "inventories of goods with receipt thereto attached" in the definition of "bill of sale," did not come into force until January 1, 1879. The 1854 Act, in force until then, did not include these words.

to let on hire to M the goods specified for the term of two months for a stated sum,[17] the agreement providing that if M failed to pay, C could remove the goods, but that if M did pay, the goods were to become M's property. The agreement contained an inventory of the goods copied from that on the receipt. Lindley J. held that both documents must be taken together and regarded as a single transaction,[18] and went on: "C is quite right in saying it was intended that the property should pass when the receipt was taken, but it passed to him on an agreement that he should re-demise it. . . . It is plain that C could not have stopped there and have claimed the property, without being guilty of a gross breach of faith. . . . He could not have carted away the property at the next moment." [19]

This decision was soon followed by the Court of Appeal in *Ex p. Odell, re Walden*,[20] where the same Cochrane lent money to W using similar forms. In this case James L.J. indicated the precise reason why the two documents taken together constituted a bill of sale: "The form adopted, a sale and a demise, seems to me to be wholly immaterial. The goods before the execution of the two documents were the goods of W. After the execution of the two documents they remained still in equity the goods of W, subject to a charge upon them for the money which was advanced by C by way of loan." [21]

Thus, where the intention of the parties is that the transaction should be a loan on the security of the goods, the first stage of the transaction, which purports to be an absolute sale by B[orrower] to L[ender], takes effect only as a transfer of the legal title to the goods. It does not affect the equitable ownership of the goods, which remains in B. The second stage, the hire-purchase agreement granted by L to B (or a re-sale by L to B), has two distinct effects. As far as the legal ownership is concerned, it takes effect as a hire-purchase agreement, and the option granted to B to purchase the goods entitles B to regain the legal title. But the document, although on the face of it a grant made by the legal owner of the goods, also affects the equitable title which has remained in B: if B defaults in payment under the hire-purchase agreement and L exercises his legal right as owner to take possession of the goods, the intention of the parties is that in that event B's equitable

[17] Representing £50 plus interest.

[18] "It would not have been fair to either of the parties to have fastened upon the one piece of paper without looking at the other."

[19] (1878) 10 Ch.D. at pp. 80n.–81n.

[20] (1878) 10 Ch.D. 76, C.A.

[21] (1878) 10 Ch.D. at p. 85. The reasoning is elaborated in *Beckett* v. *Tower Assets Co., Ltd.* [1891] 1 Q.B. 638, C.A., by Fry L.J. at p. 646, and Bowen L.J. at p. 648, and adopted by Lowe J. in *Australian Metropolitan Assurance Co.* v. *Lea* [1928] V.L.R. 29 (Vict. Sup. Ct.). *Cf. Metropolitan Discounts and Investments Co., Ltd.* v. *Bowra Radio and Electrical Co., Ltd.* (1944) 18 A.L.J. 88 (High Ct. of Aus.), at p. 89, where Latham C.J. had regard only to the contractual obligations of the "buyer," overlooking the equitable rights of the "hirer."

interest shall cease. Thus the purported hire-purchase agreement may fairly be said to be an agreement " . . . by which a right in equity to . . . personal chattels . . ." is conferred, and is therefore a bill of sale within the statutory definition.[22] The argument is perhaps clinched by the following remarks of R. S. Wright J. in *Mellor's Trustee* v. *Mass & Co.*[23]: " Under these circumstances, I think that L [24] must be regarded as trustees for B,[24] and B as being the real owner, unless the property is taken out of B or charged by the hiring agreement. But, if B is to be regarded as the real owner, then the hiring agreement was an assurance to L or was an essential part of their title, and it operated as a licence by B to L to take possession of the goods as against B's equitable interest. . . ."

Discovering the Intention of the Parties [25]

Having justified the courts' search for that elusive entity, " the intention of the parties," we must now consider the question originally posed: what principles, if any, govern the discovery of intention?

First, it may be convenient to list the factors that have been discussed in the various cases as important in determining the intention of the parties. These are as follows:

(a) L's rights over the goods.
(b) L's rights if B defaults.
(c) The adequacy of the price paid by L.
(d) The identity of the seller.
(e) The contractual capacity of L and B.
(f) The relationship between L and B.
(g) The accuracy of the documents.

(a) *L's rights over the goods*

If it is clear on the facts that, on acquiring the legal title, L is at liberty to take possession of the goods immediately and to sell or hire them elsewhere, there is little justification for describing the transaction as a loan on security. And if L in fact hires back to B different goods (even though of a description identical to those he has purchased, such as a car of the same model and year), there is even less possibility of describing it as a loan.

It is true that in many cases the question of L's rights as against the goods can only be answered by circular reasoning: you cannot tell whether it is a secured loan by asking what L can do, because what L can do depends on whether the parties intend the transaction to be a secured loan. Nevertheless, there are some cases

[22] Bills of Sale Act, 1878, s. 4; above, p. 402.
[23] [1902] 1 K.B. 137, 140. Affirmed by C.A., [1903] 1 K.B. 226, and by H.L., *sub nom. Maas* v. *Pepper* [1905] A.C. 102.
[24] I have substituted " L " for " the defendants " in the original, and " B " for " Mellor," so as to maintain the trend of the argument.
[25] For the ideas behind this section, and for much of the detail, I am indebted to my colleague, Mr. C. Grunfeld, Reader in Law in the University of London.

where it is reasonably clear that L is to have no right to take the goods away, so that it is possible for the court to find that the intention is to create a loan on security.

A good example, where much depended on this point, is *Mellor's Trustee* v. *Maas & Co.*[26]: B had agreed to buy from S a freehold hotel, with furniture, fixtures and effects, for £30,000. The value of the chattels was agreed at £3,000. B, being unable to raise sufficient money to complete the purchase, approached L. But L refused to take a fourth mortgage on the hotel offered by B, and B declined to grant to L a bill of sale on the chattels. L then, at his own suggestion, approached S, and it was agreed between all three parties to complete the deal in the following way: (1) L bought the chattels from S for £2,000; (2) L hired the chattels to B under a hire-purchase agreement for a total of £2,412 16s.; (3) B completed the purchase of the hotel from S. On B's bankruptcy 18 months later, his trustee claimed that the hire-purchase agreement was a bill of sale. R. S. Wright J. upheld the trustee's claim, saying:

> "The question is, was there a real sale to L[27] in their own right? The object of all the parties was a loan on security . . . It was to be a sale only on terms of leaving the goods in the public-house for B at the price of £2,000. No one can suppose that L were to become absolute beneficial owners, free to remove the goods and deal with them as they pleased. S would not have agreed to that, nor would B have agreed to it. It would have defeated the common purpose of selling the business as a going concern."[28]

Nevertheless, too much reliance cannot be placed on this factor alone: even where the court is satisfied that the common intention is for B to retain possession of the goods which he sells to L, this does not conclude the matter, for other considerations may also be relevant and may lead the court to find that the transaction is "a real sale and a real hiring back."[29]

(b) *L's rights if B defaults*

If the transaction is a mortgage, the inference is that L's rights over the goods are merely a security for the money due to him. If he sells the goods and recovers more than he is owed, together with interest and costs, the excess belongs to B. Thus, in *Manchester, Sheffield and Lincolnshire Railway Co.* v. *North Central Wagon*

[26] [1902] 1 K.B. 137; affirmed by H.L. *sub nom. Maas* v. *Pepper* [1905] A.C. 102.

[27] See note 24, above.

[28] [1902] 1 K.B. 137, at p. 140. In the House of Lords, Wright J.'s inferences of fact were unreservedly accepted by Lord Halsbury L.C. and Lord Lindley, but were accepted only with some hesitation by Lord Macnaghten and Lord James ([1905] A.C. at pp. 104 and 105).

[29] *British Railway Traffic and Electric Co.* v. *Kahn* [1921] W.N. 52, *per* Rowlatt J. In this case the learned judge purported to follow *Yorkshire Railway Wagon Co.* v. *Maclure* (1882) 21 Ch.D. 309, C.A., but (as will be seen below) that case is not an authority on bills of sale.

Co.,[30] where it was alleged that railway wagons held under a hire-purchase agreement were in truth merely security for a loan of £1,000, Lord Herschell observed: "The transaction between the parties was not in my opinion really a loan upon security of the wagons. It differed materially in its incidents from such a transaction. If e.g. B had made default after payment of some of the quarterly sums prescribed by the agreement of lease and the respondents had taken possession of the wagons and sold them for a sum which, with these payments, exceeded £1,000 and interest, B would have had no claim to an account and payment of the surplus."[31]

It is suggested that today such a consideration would carry little weight. It leaves the way open for a harsh lender, by virtue of his very harshness, to increase his rights against a weak borrower. Indeed, in *Polsky* v. *S. and A. Services*,[32] where L was a finance company which purchased a car from B and then let it to B in a common form of hire-purchase agreement, Lord Goddard C.J. commented: ". . . considering that [L] had been repaid £150 in monthly instalments, if they were then entitled to take possession of the car although they were offered the balance of what they had provided,[33] it seems to show that this is a case in which . . . the Bills of Sale Acts are required for the protection of a borrower." This serves to emphasise the difference between the protection afforded to a mortgagor (whether of goods or of land) and that given to a hirer under a hire-purchase agreement.

Another aspect of L's rights which might be thought relevant is whether L can sue B for repayment of the alleged loan if B defaults. Essentially, this turns on whether, having sold the goods to L, B becomes entitled to repurchase the goods under a credit-sale agreement (which contains an obligation to pay the whole of the price[34]) or under a hire-purchase agreement (which does not bind B to pay the whole hire-purchase price as such, and gives him a mere option to purchase in certain circumstances[35]). However, the point has never been taken in any English case that, if B is not under any obligation to repay L the money received, the transfer of property by B to L cannot be "by way of security for the payment of

[30] (1888) 13 App.Cas. 554, H.L. The facts are given below, p. 527.

[31] 13 App.Cas. at p. 560. I have substituted "B" for "the Blacker Company." See too Lord Macnaghten on the same point at p. 567, where he adds: "If the wagons had not been worth sixpence, L could not have claimed from B anything beyond the arrears of rent then actually due." But this of course depends on the terms of the agreement, which may contain a "minimum payment" clause.

[32] [1951] 1 All E.R. 185, at p. 190; affirmed *ibid.*, p. 1062n., C.A.

[33] B had sold the car, but continued to pay the monthly instalments; when B fell into arrear L found out about the sale and, although B offered the full unpaid balance, L refused to accept it and endeavoured to get possession of the car. *Cf. United Dominions Trust (Commercial), Ltd.* v. *Parkway Motors, Ltd.* [1955] 1 W.L.R. 719, Q.B.D.

[34] *Lee* v. *Butler* [1893] 2 Q.B. 318, C.A.

[35] *Helby* v. *Matthews* [1895] A.C. 471, H.L.

money."[36] As a Scottish judge has pointed out, "There may be a legal security for the return of money disbursed without the existence of the relation of debtor and creditor between the person who received and the person who made the advance."[37]

(c) *The adequacy of the price paid by L*

"There is very little," said Lord Macnaghten, "in the circumstance that the value of the subject dealt with was not a matter of nice bargaining at the date of the transaction. The right of repurchase must be taken into account if the consideration is to be fairly estimated."[38]

Moreover, the inadequacy of the price may itself explain why L grants B an option to repurchase the goods. In *Victoria Dairy Co.* v. *West*[39] the tenant of an unfurnished house fell into arrears with his rent. He sold the furniture in the house to the landlord for £200, most of which was set off against the arrears of rent, and the landlord granted a new lease of the furnished house to the tenant. The tenant, however, protested that the furniture was worth £1,000, so the landlord agreed that the tenant should be entitled to "redeem" the furniture at the same price of £200, and this right was confirmed by the lease. The claim of a judgment creditor of the tenant that the transaction was an unregistered bill of sale was rejected by the county court judge, and the Divisional Court upheld his decision that there was a real, bona fide sale of the furniture, Wills J. adding: "The proviso for repurchase was only put in to satisfy the tenant's view of the value of the furniture."

Nevertheless, it is common knowledge that a lender will not advance the full value of the security offered, so that he may have an adequate margin to cover the expense of enforcing the security and the risk of a decline in its value.[40] "Mere inadequacy of price . . . would be far from conclusive against such a transaction being

[36] 1882 Act, s. 3. *Cf. Re Berghoff Printing Co.* (1932) 62 F. 2d. 493, 494 (U.S. Circt.Ct. of Apls.), cited by Gilmore and Axelrod, *op. cit.* in n. 11 above, (1948) 57 Yale L.J. at p. 543, n. 67.

[37] Lord Skerrington in *Gavin's Trustee* v. *Fraser*, 1920 S.C. 674 at p. 694 (citing *Scottish Union Insurance Co.* v. *Marquis of Queensberry* (1842) 1 Bell's App. 183, H.L., *per* Lord Cottenham at p. 201). Lord President Clyde in the same case says (p. 684): "A may make advances to B in exchange for a transfer of property, from the proceeds of which, and from these alone, A is to recoup himself, accounting to B for any profit he makes; and it may be that this is a transaction by way of security . . . though I express no opinion on the point. But, in the present case, the defender [who was held not to be a lender] was neither under obligation to realise the plant, nor to account for profits to Gavin, if he did." *Cf. Newbigging* v. *Ritchie's Trustee*, 1930 S.C. 273, *per* Lord Murray at p. 282.

[38] *Manchester, etc., Ry.* v. *North Central Wagon Co.* (1888) 13 App.Cas. 554 at p. 568. See also Cave J. in *Beckett* v. *Tower Assets Co., Ltd.* [1891] 1 Q.B. 1 at p. 25.

[39] (1895) 11 T.L.R. 233, D.C.

[40] See, for example, the Trustee Act, 1925, s. 8 (1) (b), protecting trustees lending on security where the amount of the loan does not exceed two-thirds of the value of the property.

a sale, but it does forcibly suggest that the transaction was something else, and something short of sale." [41]

In two Scottish cases the adequacy of the price has been considered in deciding whether the parties intended a sale or a mortgage.[42] In *Gavin's Trustee* v. *Fraser* [43] the fact that there was no marked disparity between the price paid and the value of the goods was one of the factors leading the First Division of the Court of Session to the conclusion that the parties intended a real sale and not a security.[44]

In *Newbigging* v. *Ritchie's Trustee* [45] a farmer "sold" stock valued at £1,100 to a solicitor for £850, and entered into a hire-purchase agreement under which the total price was £1,135. At first instance the Lord Ordinary (Lord Murray) undertook a detailed analysis of the purchase price of £850 and showed that, far from representing the market value, it was in fact based on the capital sum which could be advanced with reasonable safety so as to secure repayment over a period of three years with interest; a longer period of repayment or a higher rate of interest would have reduced the "price." "This does not look like sale," he said, "but rather towards an advance against security," [46] and his decision to this effect was upheld by the First Division.[47]

(d) *The identity of the seller*

Since the essence of a bill of sale is the granting by B (the grantor) of rights over his own goods, it might be thought that, if B had never had any property in the goods before the hire-purchase agreement, the transaction could not be described as a bill of sale. But this does not necessarily follow, as is shown in *Mellor's Trustee*

41 *Per* Lord Trayner in *Robertson* v. *Hall's Trustee* (1896) 24 R. 120 at p. 132 (Court of Session).

42 It should be explained that Scots law does not permit a mortgage of goods without delivery, and knows nothing of the Bills of Sale Acts. This has led to attempts to mortgage goods by a pretended sale, so as to take advantage of s. 17 of the Sale of Goods Act, 1893, which provides that the property in specific or ascertained goods passes to the buyer when it is intended to pass, notwithstanding the absence of delivery. By s. 61 (4) of the Act this provision (like the rest of the Act) does not apply "to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security." The Scots courts have had as much difficulty in ascertaining whether an apparent sale "is intended to operate by way of . . . security" as the English courts have had in the similar problem under the Bills of Sale Acts.

43 1920 S.C. 674.

44 The decision was criticised by the late Professor W. M. Gloag K.C. (in his title "Securities" in 13 *Encyclopaedia of the Laws of Scotland* at p. 311) on the ground that the court misconstrued s. 61 (4) of the Sale of Goods Act.

45 1930 S.C. 273.

46 1930 S.C. at p. 281. On appeal, Lord Justice-Clerk Alness also pointed out that "the sum of £850 had a direct relation to the amount requisite to enable [B] to pay off his more pressing debts" (*ibid.*, at p. 286).

47 In *Scottish Transit Trust, Ltd.* v. *Scottish Land Cultivators, Ltd.* 1955 S.L.T. 417 (First Division of the Court of Session), Lord Carmont (at p. 423) was influenced by the fact that the lender had agreed to buy the goods without any inspection or independent valuation.

v. *Maas & Co.*,[48] the facts of which have already been given.[49] Although L bought the goods from S, and then hired them to B, Wright J. thought that "L must be regarded as trustees for B, and B as being the real owner. . . ."[50]

Again, in *Johnson* v. *Rees*[51] B approached L, a moneylender, for a loan in order to buy goods at an auction. L refused the loan, but attended the auction himself and bought the goods. He then let them to B under a hire-purchase agreement. The county court judge rejected L's evidence that there was no agreement between himself and B, and no suggestion of hire, before the auction sale, and held that the transaction was a loan on security. In the Divisional Court Lush J. thought that, since the only evidence was L's, even if it was not accepted there was no positive evidence of a prior agreement, and would have allowed the appeal. Atkin J., however, thought that there was evidence on which the judge could find that L had purchased the goods at the auction as trustee for B, and the appeal was accordingly dismissed.

This means that even the common dealer——finance company ——hirer transaction could be said to be a bill of sale, the finance company buying the goods from the dealer on trust for the hirer; thus in *Motor Trader Finance, Ltd.* v. *H. E. Motors, Ltd.*[52]:

> S Ltd., car manufacturers, sold cars to L Ltd., a finance company, which thereupon let the cars to B Ltd. under hire-purchase agreements. B Ltd., which was closely associated with S Ltd., was formed with the object (*inter alia*) of acting as selling agents for S Ltd., and became sole concessionaires for the sale of S Ltd.'s cars. The hire-purchase agreements included a clause precluding the hirer from selling, assigning or in any way dealing with the car or the option to purchase, or from attempting to do so, but notwithstanding this clause the hirers, B Ltd., did sell cars subject to such agreements, whereupon L Ltd., despite breach of the agreement, accepted the outstanding balance under the agreement, less a rebate for anticipatory payment. As each hire-purchase agreement was entered into, S Ltd. gave L Ltd. an indemnity against any loss arising out of the transaction. By a standing agreement it was agreed between all three parties that if B Ltd. defaulted under any of the hire-purchase agreements L Ltd. should be entitled to terminate all the other agreements as well. On the liquidation of B Ltd. the liquidator claimed that cars then in the possession of that company under hire-purchase agreements were in fact the property of B Ltd.; he argued that the transaction was in reality the creation of a charge over the cars for money lent by L Ltd., and was created by an instrument which, "if executed

[48] [1902] 1 K.B. 137, K.B.D.; affirmed by H.L. *sub nom. Mass* v. *Pepper* [1905] A.C. 102.
[49] See p. 522 above.
[50] [1902] 1 K.B. at p. 140.
[51] (1915) 84 L.J.K.B. 1276, D.C.
[52] Unreported; House of Lords, March 26, 1926, affirming Court of Appeal (Lord Hanworth M.R. and Atkin L.J., Sargant L.J. dissenting), May 11, 1925.

by an individual, would require registration as a bill of sale." Since the charge was not registered as required by section 93 of the Companies (Consolidation) Act, 1908,[53] the security was void as against the liquidator.

The liquidator's claim was upheld by Fraser J., and his decision was affirmed by the Court of Appeal and the House of Lords. On the point that the " sale " to L Ltd. was made by S Ltd., and not by B Ltd., Lord Sumner said that L Ltd. never bought the cars in reality, or if they did, they did so as agents for and at the request of B Ltd.[54] In the Court of Appeal, Atkin L.J. appeared to take the view that L Ltd. bought the cars as trustees for B Ltd.[55]

On the other hand, an earlier House of Lords, in the leading case of *Manchester, Sheffield and Lincolnshire Railway Co.* v. *North Central Wagon Co. Ltd.*,[56] placed some weight on the fact that the sale to the alleged lender was not by the alleged borrower:

> the B Co. (a colliery company) were in possession of 100 railway wagons, the property of the S Co. (a wagon company),[57] under a " hire and purchase agreement." When £257 was still owing they fell into arrears with payments, and approached the S Co. for assistance; but as the S Co. were about to retire from business their secretary introduced the B Co. to the North Central Wagon Co. (hereinafter called " the L Co."). The B Co. wanted £1,000 to pay off the S Co. and to put themselves in funds, and the L Co. paid £257 to the S Co. and the balance of £743 to the B Co. The L Co. then let the wagons to the B Co. under a hire-purchase agreement at a rent calculated to repay the £1,000, with interest at 7 per cent., over three years. Later the name plates of the S Co. were removed from the wagons and replaced by those of the L Co. On the insolvency of the B Co. the Manchester etc. Railway Co. claimed a lien on some of the wagons, and on being sued in detinue by the L Co. denied that the L Co. owned the wagons, alleging that the transaction was a bill of sale by way of security.

At first instance,[58] Bacon V.-C. held that the transaction was " as clearly . . . within the provisions of the Bills of Sale Act as any transaction that can be stated or suggested." His decision was however reversed by the Court of Appeal,[59] and the House of Lords affirmed that there was no bill of sale. Surprisingly, several of their Lordships went on to say " that even if we were of opinion that

[53] See now Companies Act, 1948, s. 95: see p. 409, n. 67, above.

[54] I have not had the opportunity of seeing the speeches in the House of Lords, and have taken the reference to Lord Sumner's speech from Earengey on *The Law of Hire-Purchase*, 2nd ed., 1938, p. 21. I have seen transcripts of the judgments of Fraser J. and the Court of Appeal.

[55] Referring to his own judgment in *Johnson* v. *Rees* (1915), above, p. 526.

[56] (1888) 13 App.Cas. 554, H.L.

[57] " The wagon companies are the earliest examples of pure finance companies which did not originate with manufacturing or trading activities ": *Hire Purchase in a Free Society*, Harris, Seldon and Naylor, 2nd ed. (1959), p. 3.

[58] (1886) 32 Ch.D. 477, at p. 496.

[59] (1886) 35 Ch.D. 191.

the . . . documents amounted to a bill of sale, still it would not displace the title of the respondents." [60] In Lord Macnaghten's words, " If the appellants could succeed in proving that the documents which they allege to be a bill of sale were void, and could even sweep away the whole transaction evidenced by those documents, they would not defeat the title of the respondents. At the time when the respondents came forward to assist the B Co., the property in the wagons belonged to the S Co. They and they alone were the owners. The B Co. had no equity of redemption. They had no equitable rights whatever. . . . The property in the wagons passed directly from the S Co. to the respondents." [61]

It seems clear that the decision in *Manchester etc., Railway Co.* v. *North Central Wagon Co.*[62] is not that the respondents' title *could* not be defeated by showing that the transaction was a bill of sale; on the facts, however, it was held that the respondents did not purchase the wagons as trustees for the B Co. Despite the decision in *Motor Trader Finance, Ltd.* v. *H. E. Motors, Ltd.*,[63] it will be only in the rarest case that the courts will find that a finance company, buying goods from a dealer in order to let them on hire-purchase to a customer, has bought the goods on trust for the customer or as agent for the customer, even though the customer has signed the hire-purchase agreement before the finance company has bought the goods. Thus in *Colchester Motor Hire Purchase Co., Ltd.* v. *Wragge*,[64] a typical transaction, Swift J. said: " I must look behind this arrangement of a purchase by the [finance company] and a letting to [the customer] to find out the true transaction which took place between them. What do I find? I find a desire by [the customer] for a loan to enable him to buy a lorry; I find a company with money which they want to invest in financing would-be purchasers of motor vehicles. But I find that company very familiar with the law relating to moneylenders and bills of sale, and I find them quite determined not to part with their money under circumstances which would render them liable . . . to lose their money by not complying with the [requirements of the law], and they refuse to lend their money. But they make in effect a counter offer: we will not lend money, but if you like we will buy the lorry and let it to you on the hire-purchase system, and [the customer], who I think knew all about the system, agreed. . . . Counsel for the [customer] relied strongly on the fact that the hire-purchase agreement was signed before the purchase of the lorry

[60] *Per* Lord FitzGerald, (1888) 13 App.Cas. at pp. 563–564.

[61] 13 App.Cas. at p. 566. See too Lord Herschell at p. 561. *Semble* the House would, if necessary, have held that the L Co. was under no obligation, on acquiring the legal title, to enter into a hire-purchase agreement in favour of the B Co. (*cf.* section (a), above). Yet, on the facts, that seems an impossible suggestion.

[62] (1888) 13 App.Cas. 554.

[63] Unreported; above.

[64] (1923), Jones and Proudfoot, *Notes on Hire Purchase Law* (1937), p. 90, at pp. 97–98.

from [the dealer]. This is certainly a factor to be taken into consideration, but it is not conclusive." [65]

(e) *The contractual capacity of L and B*

A case where this issue was important is often cited, but is not perhaps directly in point in the present argument. *Yorkshire Railway Wagon Co.* v. *Maclure* [66] did not turn on the Bills of Sale Act, which was not pleaded, but on whether a sale by a railway company to the wagon company of locomotives and wagons, followed by a hiring back, was an *ultra vires* loan avoided by section 19 of the Railway Regulation Act, 1844. Kay J. held that although the transaction, which originated as an application for a loan, was completed in the familiar form of a sale and hiring with an option to purchase, "the mode in which it was carried out was merely an attempt to give a security for [a] loan upon the rolling stock." [67] It is clear that the common intention of the parties was that the railway company should continue to use the rolling stock, yet the Court of Appeal unanimously reversed the trial judge's finding of fact and held that the transaction shown in the documents "was the real contract between the parties." [68] In coming to this conclusion the Court of Appeal were influenced strongly by the facts that the parties were two corporations, negotiating at arm's length through their respective solicitors, who were fortified by the opinion of eminent counsel; and that lending and borrowing money were *ultra vires* the alleged lender, as they had no power to lend money,[69] and, as far as the alleged borrower was concerned, both *ultra vires* and illegal.[70] Moreover, the court undoubtedly felt that the effect of Kay J.'s decision was to uphold an unconscionable defence, and that the directors of the railway had acted honestly in arranging the transaction in the form it took and were not attempting to do something which was forbidden by the Railway Regulation Act.[71]

[65] A not uncommon occurrence is an execution of B's goods, followed by a sale by the sheriff to L, who permits the goods to remain in B's possession and hires them back to B. This was held not to be a bill of sale by B to L in *Marsden* v. *Meadows* (1881) 7 Q.B.D. 80, C.A.; *Haydon* v. *Brown* (1888) 59 L.T. 810, C.A.; *Jones* v. *Tower Furnishing Co.* (1889) 61 L.T. 84, D.C.; *Tower Finance & Furnishing Co.* v. *Brown* (1890) 6 T.L.R. 192, D.C.; *Stammers* v. *Margrett* (1905) 21 T.L.R. 342, K.B.D. *Contra*, *Re Hood* (1893) 9 T.L.R. 541, C.A.; *Beckett* v. *Tower Assets Co.* [1891] 1 Q.B. 638, C.A., where the execution was collusive. See too *Charlesworth* v. *Mills* [1892] A.C. 231, H.L.

[66] (1882) 21 Ch.D. 309, C.A. Although the decision has often been referred to in this century in cases on the Bills of Sale Acts, it was not referred to in any of the judgments or speeches in any of the courts which heard the later case of *Manchester, Sheffield & Lincolnshire Ry. Co.* v. *North Central Wagon Co.* (above), although it was relied on in argument in the Chancery Division and Court of Appeal. It was distinguished in *Hope* v. *Parrott* (1904) 7 O.L.R. 496, at pp. 502-503 (Ontario C.A.).

[67] (1881) 19 Ch.D. 478 at p. 483.

[68] *Per* Jessel M.R., (1882) 21 Ch.D. at p. 314.

[69] See Jessel M.R. at p. 312.

[70] *Per* Jessel M.R. at p. 312.

[71] See Jessel M.R. at p. 316, and particularly Holker L.J. at p. 320.

The value of this case as an authority on the Bills of Sale Acts is further weakened by three facts. First, in so far as the object of the 1878 Act is to protect creditors, Jessel M.R. drew specific attention to the fact that his decision would not and could not affect existing debenture holders.[72] Secondly, in so far as the object of the 1882 Act is to protect borrowers, it is unlikely to be thought of as the purpose of the Act to protect a railway company acting on the advice of solicitor and counsel. Thirdly, the 1882 Act, passed three months after the decision in this case, specifically excluded "any debentures [73] issued by any . . . incorporated company, and secured upon the . . . goods . . . of such company." [74]

(f) *The relationship between L and B*

Although the relationship between L and B has seldom formed the explicit basis of the court's decision, it is difficult to escape the conclusion that this is a factor which weighs with the court in interpreting the intention of the parties.

At one extreme one can list cases where L carries on business as a moneylender. In the vast majority of these cases the transaction has been held to be a bill of sale, so that the security is void.[75] At the other extreme the alleged lender is a person in an existing relationship with B and has an interest in assisting B, such as B's landlord,[76] or a solicitor who formerly acted for B and "was anxious to assist her by keeping a roof over her head," [77] or a person who, having entered into a contract with B, wishes to keep B in business so that he may carry out his contract.[78] Here the transaction is found to be genuine. Between these two extremes lie a variety of examples, the two main groups being: (a) cases where there is no existing relationship between L and B, and where L appears to have no interest in assisting B otherwise than as a lender of money: here the transaction is readily held to be a bill of

[72] (1882) 21 Ch.D. at p. 315.

[73] "A debenture means a document which either creates a debt or acknowledges it . . ." *per* Chitty J. in *Levy* v. *Abercorris Slate and Slab Co.* (1887) 37 Ch.D. 260 at p. 264, a case on the 1882 Act.

[74] 1882 Act, s. 17.

[75] *e.g.*, *Cochrane* v. *Matthews* (1878) 10 Ch.D. 80n.; *Re Walden* (*Ex p. Odell*) (1878) 10 Ch.D. 76; *Brown* v. *Blaine* (1884) 1 T.L.R. 158; *Beckett* v. *Tower Assets Co., Ltd.* [1891] 1 Q.B. 638; *Johnson* v. *Rees* (1915) 84 L.J.K.B. 1276; *Personal Loan & Finance Corpn., Ltd.* v. *Kennedy* [1948] 1 W.W.R. 318 (Alberta).

[76] For example, *Victoria Dairy Co.* v. *West* (1895) 11 T.L.R. 233; *Clapham* v. *Ives* (1904) 91 L.T. 69; *Prudential Mortgage Co.* v. *St. Marylebone Borough Council* (1910) 8 L.G.R. 901; 74 J.P.Jnl. 339.

[77] *Stammers* v. *Margrett* (1905) 21 T.L.R. 342. Contrast the Scottish case where the solicitor had not acted for B, a farmer: "Nor is it obvious why a practising solicitor should desire to buy 15 cows and 4 horses . . .": *per* Lord Justice-Clerk Alness in *Newbigging* v. *Ritchie's Trustee*, 1930 S.C. 273 at p. 286.

[78] *Gavin's Trustee* v. *Fraser*, 1920 S.C. 674. In *Madell* v. *Thomas* [1891] 1 Q.B. 230, C.A., L had sold goods to B, who had not paid for them, but it does not appear from the report that L had any interest in assisting B other than to secure payment of the money owed; held to be a bill of sale.

sale [79]; (b) cases involving hire-purchase finance companies, some of which fall on each side of the line; this is, perhaps, the most difficult group of cases since it includes a number of cases which, in the light of other considerations, might have been thought to constitute bills of sale, but which were held to be genuine transactions.[80]

(g) *The accuracy of the documents*

If the documents drawn up by the parties do not accurately record the facts of the transaction as revealed by the evidence, the inference that the parties did not intend the transaction to take effect in the way described by the documents is a fair one.

This does not mean that the documents must be faultless in the representation of the legal position: "I regard it as futile to expect unvarying accuracy of legal language from a busy wood merchant and a semi-literate farmer in a region where eminent lawyers are liable to express themselves inaccurately." [81] But the documents should "accurately set out the deal between the parties as it took place and at the time when it took place." [82]

Thus, in *Polsky* v. *S. and A. Services*,[83] B bought a car from X for £895, and gave his cheque for this amount. At the time he had under £400 in his account, but he had arranged overdraft facilities. In order to obtain money to pay into his account to meet the cheque he approached L, a finance company, and the transaction between them was carried out by means of their usual hire-purchase documents. The invoice for the sale from B to L showed the price of £895 "less first payment due under your agreement £495," and L paid B the balance of £400. The hire-purchase agreement provided for the payment by B to L of £495 on signing the agreement, and for the payment by instalments of the balance of £450 (*i.e.*, £400 plus £50 "charges"). Lord Goddard C.J. pointed out that the documents used "would be completely appropriate to the class of transaction whereby the finance company buys from a dealer, while at the same time some of the purchase price is provided by the prospective buyer," but that here, despite the statement in the

[79] *e.g.*, *Re Watson* (1890) 25 Q.B.D. 27; *Maas* v. *Pepper* [1905] A.C. 102.

[80] The most difficult cases are *Manchester etc., Ry. Co.* v. *North Central Wagon Co.* (1888) 13 App.Cas 554; *British Railway Traffic & Electric Co., Ltd.* v. *Kahn* [1921] W.N. 52; more fully reported in Jones and Proudfoot, *Notes on Hire Purchase Law*, at p. 84; and *British Ry. etc., Co., Ltd.* v. *West & Co., Ltd.*, Jones & Proudfoot, *op. cit.*, p. 87. In *Scottish Transit Trust, Ltd.* v. *Scottish Land Cultivators, Ltd.*, 1955 S.L.T. 417, 423, Lord Carmont explains a difference between finance companies and private individuals, in that the former "can represent themselves as being possibly interested in [the goods] as purchasers, because they could hire them to other clients if the defenders were not in the field as the intended hire purchaser." For a statement of the attitude of the courts to finance companies, see *Transport and General Credit Corpn., Ltd.* v. *Morgan* [1939] Ch. 531, *per* Simonds J. at p. 551.

[81] *Per* Lord Skerrington in *Gavin's Trustee* v. *Fraser*, 1920 S.C. 674 at p. 694.

[82] *Per* Lord Goddard C.J. in *Polsky* v. *S. and A. Services* [1951] 1 All E.R. 185 at p. 189.

[83] [1951] 1 All E.R. 185; affirmed by C.A., *ibid.*, p. 1062n. Also reported [1951] W.N. 136, 256.

documents, there had been no payment of £495 by B to L. "The transaction which the documents would accurately record," said Lord Goddard, "would have been one in which B had paid the sum of £495 either to L or to X, and then L had completed the purchase of the motor car by paying £400 for it. In my opinion, the true transaction here was nothing more or less than a loan of £400 by L to B on the security of the car." [84]

Lord Goddard distinguished an earlier case, *Staffs Motor Guarantee, Ltd.* v. *British Wagon Co., Ltd.*[85] In that case H, a car dealer, wished to dispose of a lorry which he owned to P on hire-purchase terms. He approached the British Wagon Co., asking them to buy the lorry from him and let it to P under a hire-purchase agreement, but they declined to do so. Instead, H sold the lorry to the Wagon Co. for £900, which they paid him, and they let it to H himself under their usual form of hire-purchase agreement, H paying the initial payment of £300. The Wagon Co. then granted H permission to sub-let the lorry to P without prejudice to their agreement with H. Instead of sub-letting to P, H purported to sell the lorry to the plaintiffs, another finance company, and the plaintiffs let the lorry to P under a hire-purchase agreement. Six months later H fell into arrear with his payments to the Wagon Co., and they seized the lorry at P's premises. The plaintiffs sued the Wagon Co. in detinue and conversion, claiming *inter alia* that the hire-purchase agreement in favour of H was a bill of sale to secure a loan of £600. Mackinnon J. found that the transaction was a genuine purchase of the lorry by the Wagon Co. and a genuine reletting of it to H, saying:

> "It was done in this way, I think, because a convenient method was thus found by the defendants of making use of their printed agreements, in lieu of the transaction taking the form that H had suggested—namely, a hire-purchase agreement to P, and a guarantee of payment by P from H. It seems to me to be highly likely that the defendants adopted this course because they supposed that if they departed from their printed forms it might be necessary to employ a solicitor to prepare the proper guarantee, and that from a business point of view the more convenient way of carrying out that transaction would be to make use of their ordinary documents." [86]

As Lord Goddard observed in *Polsky's* case, "It is quite clear that the real object in that case was to get the lorry into the hands of the third party, and there were the three parties who are usually found in these hire-purchase transactions. H was a dealer in cars,

[84] [1951] 1 All E.R. at p. 190. I have substituted "B" for "the plaintiff," "L" for "the defendants," and "X" for the name of the original seller. L's claim for the return of the car and damages for its detention was dismissed. But there was then nothing to stop them suing B personally for money had and received: see p. 408, above, n. 55. It is not recorded whether such a claim was made.

[85] [1934] 2 K.B. 305, K.B.D.

[86] [1934] 2 K.B. at p. 311. The plaintiffs also failed in claims based on the Factors Act, 1889, s. 2, and the Sale of Goods Act, 1893, s. 25 (1).

his customer was the third party, and the defendants were the financiers. If they, as was usual, had bought from H and re-let the lorry direct to the third party, no questions could have arisen. That was the essence of the transaction which was carried out in a different way."[87]

On the other hand, in *Elsey & Co., Ltd.* v. *Palmer*,[88] which was not cited in *Polsky* v. *S. and A. Services*,[89] the facts appeared to be substantially the same as in *Polsky's* case, save that B had not yet paid X[90] and the finance company gave B a cheque for the full price. Greer J. at first instance, under the impression that B had already paid X, held that the transaction was genuine, and the Court of Appeal,[91] in possession of the full facts, affirmed his decision. However, the Court of Appeal did not refer to the form of the documents or their accuracy, and the decision of Greer J. is not reported.

Other cases have referred to the question whether the transaction recorded in the documents was intended to be acted upon according to its purport and apparent effect,[92] and the question assumed importance in *Motor Trader Finance, Ltd.* v. *H. E. Motors, Ltd.*[93] the facts of which have already been referred to.[94] In that case B Ltd. took cars under hire-purchase agreements which precluded them from selling or attempting in any way to deal with the cars, although their sole function was to act as selling agents for the cars in question. "These documents," said Atkin L.J. in the Court of Appeal, "are as far from the true facts as imagination could place them. Nor is it a case of parties inadvertently or carelessly using a printed form which in some particular contradicts an agreed term, or of two parties [*sic*] waiving an otherwise enforceable term. The essence of the transaction if L Ltd. were . . . to be protected . . . was . . . that the hirers could not pass the property to anyone else. . . . Yet . . . the existence of such a clause prevented B Ltd. from carrying out the business operation of selling cars which all parties intended should be continued."

Conclusions

In determining whether a sale of goods followed by a hire-purchase (or credit-sale) agreement is to be regarded as a bill of sale, the court seeks the intention of the parties. This is a question of fact

87 [1951] 1 All E.R. at pp. 189–190.

88 (1924), Jones and Proudfoot, *Notes on Hire Purchase Law*, p. 99, C.A. *Cf. Colchester Motor Hire Purchase Co., Ltd.* v. *Stewart* (1924), Jones & Proudfoot, *op. cit.*, p. 75, C.A., held to be a bill of sale.

89 [1951] 1 All E.R. 185 and 1062n.

90 And, according to Scrutton L.J. (*loc cit.*, p. 100), the property had not yet passed to B; *sed quaere.*

91 Bankes, Scrutton and Sargant L.JJ.

92 *e.g.*, *Yorkshire Ry. Wagon Co.* v. *Maclure* (1882) 21 Ch.D. 309, 317; *Re Watson* (1890) 25 Q.B.D. 27, 35, 37.

93 (1926), unreported (H.L.).

94 See above, pp. 526–527.

and, athough this intention is not always as fictitious as "the intention of the legislature," it is even more difficult to ascertain since the words used by the parties may not even be intended to represent their intention.[95]

There are many decisions, a large number of which appear to be mutually inconsistent (though judges seldom admit the inconsistency). There are statements by distinguished judges which, in emphasising the distinction between the two types of transaction, deny the existence of any distinguishing features; thus Lord Macnaghten: "As regards their legal incidents, there is all the difference in the world between a mortgage and a sale with a right of repurchase. But if the transaction is completed by redemption or repurchase as the case may require there is no difference in the actual result. The B Co. of course looked forward to repaying the money. There was nothing, therefore, so very improper or suspicious in their entering the transaction in their books as a loan. When it was put to the secretary of the B Co., 'You have said that it was not handed to you as a loan of £100, but that it was paid for the wagons' he answered naturally enough, and not I think altogether incorrectly, 'Well, it was paid for the wagons, but you might call it a loan for all that.'"[96]

In different cases, different factors have assumed importance. Seven of these factors have been examined in some detail.[97] In the present state of the law, it may be that some of these factors can usually be disregarded, notably the contractual provisions governing L's rights if B defaults, the identity of the seller, and the contractual capacity of L and B. The most important factors are, it is suggested:

1. The accuracy of the documents.
2. The adequacy of the price paid by L.[98]
3. Although not explicitly referred to in the cases, the relationship between L and B.

But whenever the question of "genuine transaction" or bill of sale arises, "he must be a bold, if not a conceited, man who can feel confidence in forming, or expressing, an opinion."[99] The present state of the law is unsatisfactory in that in many cases it is

[95] What if the parties have different intentions? In only one case has this even been acknowledged to be a possibility: *Yorkshire Railway Wagon Co.* v. *Maclure* (1882) 21 Ch.D. 309, *per* Jessel M.R. at p. 314. And see the warning given by Gilmore and Axelrod, "Chattel Security" (1948) 57 Yale L.J. 517 at p. 518, n. 3.

[96] *Manchester, Sheffield etc., Ry. Co.* v. *North Central Wagon Co.* (1888) 13 App.Cas. 554 at pp. 567–568. The facts are given above, p. 527. *Cf.* the similar evidence in *Commercial Finance Corpn., Ltd.* v. *Capital Discount Corpn., Ltd.* [1931] O.R. 22 (Ontario, App.Divn.), held to be a loan.

[97] A cynic might add an eighth: the length of the judge's foot.

[98] It is submitted that the Scottish approach is to be preferred to that of the English courts: see above, pp. 524-525.

[99] *Per* MacKinnon L.J., on the Rent Acts: *Winchester Court, Ltd.* v. *Miller* [1944] K.B. 734, 744.

impossible to advise with certainty whether a particular transaction will be upheld or avoided by the courts.[1] Moreover, this affects not merely the rights of the parties to the transaction, but often innocent third parties.[2]

The Future

It is submitted that this branch of the law is in need of reform. The distinction between a bill of sale and a hire-purchase agreement, enunciated in *McEntire* v. *Crossley Brothers, Ltd.*,[3] rests fundamentally on the wording of the Bills of Sale Acts,[4] and not on considerations of purpose or social policy. The problem is moreover closely linked with another, which is becoming increasingly urgent: the position of an innocent person who "buys" goods from the hirer under a hire-purchase agreement.[5]

As has been shown, the two purposes of the Bills of Sale Act (1878) Amendment Act, 1882, are to protect creditors of (and purchasers from) B, who are deceived by what they take to be ownership, and to protect B from harsh terms imposed by L. These same two considerations now apply to the hire-purchase agreement: the first is unsolved as yet, the second partially met by the provisions of the Hire-Purchase Acts of 1938 and 1954, which are of limited application.

The solution, which is of course possible only by legislation, is to introduce into English law the principles set forth in Article 9 of the Uniform Commercial Code,[6] adopted so far by five of the United States.[7] This Article applies "to any transaction (regardless of its form) which is intended to create a security interest in personal property,"[8] among which are included pledge, chattel mortgage, conditional sale, and bailment-lease (our "hire purchase"). It is recognised that in all these cases one person (whether he be owner or possessor) has rights in goods by way of security, while another

[1] It is particularly unfortunate that criminal liability should turn on the distinction: see *R.* v. *Deller* (1952) 36 Cr.App.R. 184 (C.C.A) and *R.* v. *Williams and Hamilton-Walker* [1959] Crim.L.R. 727 (C.C.C.).

[2] Contrast the position of the unsuccessful third party in *Staffs. Motor Guarantee, Ltd.* v. *British Wagon Co., Ltd.* [1934] 2 K.B. 305, above, p. 532, with that of the more fortunate "buyer" in *Polsky* v. *S. and A. Services* [1951] 1 All E.R. 185, above, p. 523, n. 33.

[3] [1895] A.C. 457, H.L., above, pp. 516–517.

[4] *Cf. Re Smith & Hogan, Ltd* [1932] S.C.R. 661 at p. 667 (Sup.Ct. of Can.).

[5] See *Eastern Distributors, Ltd.* v. *Goldring* [1957] 2 Q.B. 600, C.A., at pp. 614–615, *per curiam*.

[6] Published in 1952 by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, and subsequently revised. The literature on the Code is already great, and is inevitably growing. Braucher, "The Legislative History of the Uniform Commercial Code" (1958) 58 Col. L.Rev. 798 offers "a review of the history of the code project and of the available literature on its various aspects." Reference may also be made to symposia on the proposed Code to be found in (1951) 16 *Law and Contemporary Problems* 1–343, and [1952] Wisc.L.Rev. 197.

[7] Pennsylvania (1954), Massachusetts (1958), Kentucky (1960), Connecticutt (as from 1961) and New Hampshire (as from 1961).

[8] Section 9–102 (1) (*a*).

person has rights in the goods (whether of ownership or of possession) subject to the security interest. The broad effect of Article 9 is (a) to protect third parties by requiring the filing of a "financing statement" at a public office, in certain cases,[9] and (b) to protect the debtor by (roughly speaking) equating the rights of a secured party with the rights of a mortgagee of land (including, in particular, an obligation to account to the debtor for any surplus after sale of the property).[10] One effect of such an approach might be the rehabilitation of the chattel mortgage in English law, and the "recognition that chattel security is a legitimate component of the credit structure."[11]

In this direction, it is suggested, lies the way to a system which is comprehensive, just, predictable and (not least important) understandable and workable by the businessman himself.

Aubrey L. Diamond.*

[9] *Cf.* the Instruments Act, 1928 (Victoria), s. 51, which avoids a sale of goods where the seller retains possession under a contract for letting or hiring (or retakes possession under such a contract within six months) unless both the contract of sale and the contract of hire are in writing and are filed at a public registry.

[10] Section 9-504 (1). On Article 9 see, *inter alia*, Gilmore, "The Secured Transactions Article of the Commercial Code" (1951) 16 *Law and Contemporary Problems* 27; Kripke, "The Modernization of Commercial Security under the Uniform Commercial Code" (1951) 16 Law and Contemp. Prob. 183; Birnbaum, "Article 9—A Restatement and Revision of Chattel Security" [1952] Wisc. L. Rev. 348; Coogan, "Article 9 of the Uniform Commercial Code . . ." (1959) 72 Harv.L.Rev. 838 at pp. 845–850; Kripke, "Article 9: Secured Transactions under the Uniform Commercial Code in Pennsylvania" (1954) 15 Un.Pitt.L. Rev. 602. For a criticism see Beutel, "The Proposed Uniform [?] Commercial Code Should Not Be Adopted" (1952) 61 Yale L.J. 334, especially pp. 354–357, with Gilmore's reply, *ibid.*, p. 364, n. 1.

[11] Birnbaum, article referred to in previous note, [1952] Wisc.L.Rev. 348 at p. 349.

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STATUTES

Judicial Pensions Act, 1960

This statute, despite its colourless title, has made an important innovation in the structure of the higher judiciary which is only in the remotest way connected with pensions, that is it has established seventy-five as the compulsory retiring age for all judges of the Supreme Court and for the Lords of Appeal. Such a retiring age had been recommended on a number of occasions in the past by Royal and other Commissions, notably in 1913 by the St. Aldwyn Commission and by the Peel Commission in 1936. Both these Commissions had recommended seventy-two as the appropriate age, possibly because it had already been accepted as the retiring age for County Court judges, and had considered that there should be a possibility of extension to seventy-five in exceptional cases. On the other hand the seventy-five limit had not been without its supporters, among whom the Bar Council were perhaps the most noteworthy. In the discussions during the passage of the Bill through Parliament there was a good deal of difference of opinion on this matter which did not align itself on a party basis. There were those who considered that there should be no retiring age, and those who considered that the retiring age had been fixed too high. The view was also expressed that the retiring age might well be different for judges of first instance and for appellate judges—it was argued that the work of a trial judge who sits alone and, in the Queen's Bench Division, may have to go on circuit is more exacting, at any rate physically, than that of a judge of appeals, and that many of the most eminent judges, especially in the House of Lords, had continued at work long after their seventy-fifth year, among those mentioned being Lords Halsbury, MacNaghten, Lindley, Moulton, Dunedin, Atkin, Macmillan, Finlay and Wright. Indeed in the House of Lords where this aspect of the Bill was argued more fully than in the Commons an attempt was made to persuade the Lord Chancellor to exclude Lords of Appeal from the age limit established by the bill, but without success.

The Lord Chancellor took the view that while there was no doubt a case for extending the age limit in particular cases the responsibility of selecting such cases was too invidious for any Lord Chancellor, or indeed any committee of fellow judges, to have to undertake. Granted that a limit must be fixed, seventy-five seemed the most reasonable age. No doubt this would from time to time deprive the public of the services of a distinguished judge still capable of good work, but it would prevent others from going on after they had passed their best. In an interesting historical survey

he pointed out that many of the most distinguished Lords Chancellor or Lords of Appeal had commenced their judicial work in the House in the early sixties or even in the fifties, and in a survey of a number of famous cases, ranging from *Entick* v. *Carrington* to *Donoghue* v. *Stevenson*, he found that the judges concerned had almost always been under seventy or sometimes under sixty. He pointed out further that the path of promotion from one court to another is blocked if judges remain in office until of great age.

A point made by Lord Ogmore was that if the proposals now being made for a peripatetic Judicial Committee of the Privy Council came to fruition, the strain on the members would be considerably increased, and the work would call for younger men. It is worth while to point out that the Lord Chancellor indicated that in his view there are many arguments in favour of this proposal.

On the pensions side the substantial element in the new statute is that it introduces a scheme of graduated pensions, depending on length of service, under which a judge will be able to retire on pension at seventy. Until now a judge has had to serve fifteen years before earning a pension: this has occasionally, in the case of late appointees, resulted in judges struggling on in office in obvious physical or even mental distress. It will now be possible to appoint an elderly man without so much risk of this distressing sequel.

C.

The Last of the "In-Laws"

The atomisation of the family unit has been one of the outstanding social developments of recent years in economically advanced countries. The desirability of separation between succeeding generations of adults has been increasingly accepted in this country since 1945. The necessity for "living with in-laws" is now generally regarded as a major hardship for young married couples, and a fruitful source of the break-up of marriages.[1]

The Marriage (Enabling) Act,[2] which came into operation on April 13 last, seems both a product and a likely progenitor of family fission, but between adults of the same rather than succeeding generations. The Act contains two sections, of which only one concerns substantive law, and its main provision[3] is to enable a man to marry, after April 12, 1960, and in England or elsewhere, either: (a) the sister, aunt or niece of his former wife during that wife's lifetime as well as after her death,[4] or (b) the former wife of

[1] The Report of the Royal Commission on Marriage and Divorce (Cmd. 9678) listed in para. 44 the scarcity of houses, which prevents many young couples from starting married life in a home of their own, as a reason for marriage failure.

[2] 8 & 9 Eliz. 2, c. 29.

[3] s. 1 (1).

[4] As permitted by the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 4).

his own brother, uncle or nephew during the lifetime as well as after the death [5] of the husband so related to him. The provision [6] that kinship of both the whole and half blood are equally referred to seems to have been inserted *ex abundante cautela*.

This does not quite mark the end of rules of affinity in English law. The new Act in fact merely enables a man to marry during the lifetime of his former wife those whom, under previous enactments,[7] he might have married after her death. His wife's mother and grandmother [8] remain his parents-in-law, and her daughter and granddaughter remain his stepchildren; with them marriage is still forbidden, even after the death of the former wife.

It may be that the isolation of the married couple and their infant children in this country has already progressed so far that this new legislation will have little social effect. The illustration of the alleged hardship of the previous law with which Lord Mancroft introduced the Bill [9] was not represented as typical. He instanced the situation of a soldier who had married an English girl in Cairo, and who met his wife's sister for the first time after his wife had deserted him and their only child for an adulterous association. In the peculiar circumstances it is understandable that the couple had previously lived isolated from the wife's blood relations, and that the wife never met her own sister in the company of her husband. Clearly any rules designed to safeguard the family circle after the introduction to it of members' spouses are inappropriate to such circumstances. The Royal Commission on Marriage and Divorce recommended [10] that a man should be enabled to marry his divorced wife's sister, but with three dissentients. If consideration was at any time given by the legislature to the dual role of the prohibited degrees of marriage as ensuring the integrity of the family circle [11] as well as promoting biological wellbeing, there is no evidence of it. It seems surprising that so sweeping a change in the concept of the family in English law should have been enacted without extensive social investigation.

A useful subsection of the Act [12] deals with the conflict of laws aspects by providing that the Act shall not validate a marriage if,

[5] As permitted by the Deceased Brother's Widow's Marriage Act, 1921 (11 & 12 Geo. 5, c. 24).

[6] s. 1 (2).

[7] See notes (4) and (5) *supra*.

[8] The unlikelihood of a particular marriage has not prevented its prohibition. The prohibition on marriage with one's grandmother by blood, for example, remains.

[9] See H. Lords Deb., Vol. 220, No. 29, Col. 652, January 26, 1960.

[10] See Cmd. 9678, para. 1167.

[11] A modern example of the recognition of this dual role is contained in the adoption legislation. The Adoption Act, 1958, s. 13 (3) provides that an adopted child shall be deemed to be within the prohibited degrees of consanguinity with his adopter, and shall so remain although subsequently readopted by others. He presumably remains within the prohibited degrees with his blood relatives, although there appears to be no specific provision to this effect.

[12] s. 1 (3).

by the law of the domicile of either party at the time, such a marriage is invalid. This provision should avoid the difficulties of such decisions as that in *Sottomayer* v. *de Barros* (No. 2).[13] It also represents a decisive and welcome rejection of the theory advanced in some quarters[14] that on marriage a woman's legal capacity in her pre-nuptial domicile is retrospectively obliterated. The doctrine that when a woman marries a man domiciled elsewhere, with or without the intention of settling in the country of his domicile, she "proposes to sever her connection"[15] with the country of her pre-nuptial domicile is patently untrue as well as sociologically unsound. Such theories belong to the dark ages of English law before 1883, when a woman's identity was obliterated on marriage or, as the lawyers preferred to say, became merged in that of her husband. To the extent to which the present Act gives such theories their quietus it deserves a warm welcome.

O. M. Stone.

Local Employment Act, 1960

This is the measure which the Government promised during the General Election to help areas with a high rate of unemployment. It was heralded as being the most important Bill of the present session. In fact it is largely a re-enactment of the Distribution of Industry Acts, 1945–58. The Act came into force on April 1, 1960.

The Act, unlike Gaul, is divided into two parts. Part I provides the carrot, *i.e.*, inducements to entice businesses to go to localities with a high rate of unemployment. Part II is concerned with the stick by which factories will be prevented from being erected in congested areas and thereby again steered to the unemployment areas.

Fundamental to the Act is the concept of the development district, *i.e.*, localities where in the opinion of the Board of Trade a persistently high rate of unemployment exists or is to be expected either seasonally or generally (s. 1 (2)). In the designation of these areas there has been an important departure from the procedure under previous legislation. Under the Distribution of Industries Act, 1945, the development areas were listed in the Schedule to the Act and any changes needed an affirmative resolution of both Houses of Parliament. By the Distribution of Industry (Industrial Finance) Act, 1958, new areas could be added by purely administrative action of the Board of Trade. This is the procedure which will be used under the new Act both to designate the localities originally and to alter them whether by addition or subtraction. The list of localities published by the Board of Trade is thus not subject to parliamentary sanction. The Government

[13] (1879) 5 P.D. 94. See Dicey: *Conflict of Laws*, 7th ed., rule 31, and p. 251.
[14] *e.g.* Cheshire, *Private International Law*, 5th ed., p. 305 *et seq.*
[15] *Op. cit.* 5th ed., p. 309.

defended this proposal on the ground of flexibility, claiming that the rigidly defined development area was out of date. But the Parliamentary Secretary to the Board of Trade admitted that it will also enable places to be descheduled. It was previously impossible as a matter of practical politics to obtain the affirmative resolution of both Houses of Parliament required for descheduling so that the Board used to resort to de facto descheduling, *i.e.* making no attempt to exercise its powers.[1]

There are six powers of inducement contained in Part I of the Act. Under section 2 the Board of Trade has power to acquire land in development districts by agreement or compulsorily and erect buildings to provide premises for any business (not merely industrial undertakings) willing to come to the area. Such premises will be managed for the Board by Industrial Estates Management Corporations[2] which are the successors of the Industrial Estates Companies created under the 1945 Act. They will lease the land to the businessman.

For the businessman who wishes to own his premises there is a new power provided in section 3 which enables the Board of Trade to make a grant towards the cost of the building equal to 85 per cent. of the difference between the estimated cost of providing the building and its market value. It remains to be seen whether businessmen prefer to own their premises rather than rent them ready-made from the Corporations.

Thirdly, under section 4, the Board of Trade has power to make grants or loans to undertakings willing to come to the development district to provide them with anything needed for the purpose of the undertaking which would include plant, machinery, working capital or cost of transfer of the undertaking. Grants, as distinct from loans, have in the past been rare and this policy is expected to continue.[3]

The Act provides certain safeguards upon the use of the powers under sections 3 and 4. First, there is the advisory committee appointed by the Board of Trade[4] which must be consulted before a grant is made under section 3 and without whose recommendation a grant or loan under section 4 cannot be made. A grant under section 3 also needs the consent of the Treasury, whilst under section 4 the advisory committee must act in accordance with general directions given by the Board with the consent of the Treasury. Finally, grants under sections 3 and 4 may be made

[1] H.C. Deb., Vol. 613, col. 149.

[2] s. 8 creates three corporations—one for England, Scotland and Wales, each consisting of a chairman and four members appointed by the Board of Trade. They must act in accordance with general directions of the Board (s. 9 (4)). Their accounts are examined by the Comptroller and Auditor-General and must be laid before Parliament (s. 10).

[3] H.C. Deb., Vol. 613, col. 40.

[4] This is a continuation of the committee existing under the Distribution of Industry Act, 1945.

subject to conditions for repayment. This will ensure that a grant obtained to build a factory will have to be repaid if, for example, the factory is later turned into a warehouse.

Under section 5 derelict, neglected or unsightly land in a development district may either be acquired by the Board, or the Minister of Housing and Local Government may make grants to enable local authorities to acquire it. Such land may then be brought into use or dealt with so as to improve the amenities of the neighbourhood. But this can only be done where it will render the development district more attractive to industry, and not merely for the sake of amenity.

Section 6 enables the Minister of Labour to make grants to workers who migrate to a development district with the undertaking in which they are employed. These grants include fares, removal expenses and lodging allowances.

Finally, section 7 gives the Minister responsible power to make grants or loans towards the cost of improving basic services, *e.g.*, transport facilities, electricity or water supply, sewerage, etc., in a development district to enable it to attract customers. The Minister regards this as a power to be exercised on a purely local basis, *e.g.*, to provide access roads and not to redesign the national transport system.[5]

All these powers except the building grants under section 3 are re-enactments with slight modifications of provisions in the Distribution of Industry Acts, 1945–58.

Part II of the Act closes some loopholes in the legislation (s. 14 (4) Town and Country Planning Act, 1947) under which an industrial development certificate (I.D.C.) has to be obtained from the Board of Trade before an industrial building[6] of more than 5,000 square feet can be erected. The Act now requires (s. 18) an I.D.C. to be obtained also for a change of use of a non-industrial building to an industrial building so that it will no longer be possible to build a warehouse without an I.D.C. and then change it to a factory without an I.D.C. It is also no longer possible to build a factory without an I.D.C. by erecting several buildings each under 5,000 square feet, as the total floor space created by development carried out since the new Act in respect of a building or group of buildings must be under 5,000 square feet to escape control (s. 19). By the I.D.C. procedure it is possible to prevent new factories being built in congested areas like London and the Midlands, but unfortunately such control does not apply to office buildings. It will often be a gamble whether a refusal of an I.D.C. will ensure the factory being built in a development district or will end in the factory not being built at all. This is where the inducements in Part I should help the Government to bring about the desired result.

[5] H.C. Deb., Vol. 613, col. 42.

[6] Now defined in s. 21.

Such are the main provisions of the Act and the question now arises whether they are sufficient to solve the unemployment problem. This will depend primarily on whether the Government will make a vigorous use of its powers and spend sufficient money. It was the constant indictment of the Opposition throughout the debates on the Bill that the existing powers had not been used by the Government to the full in the past. They therefore introduced an amendment to make it a mandatory duty to exercise the powers under the Act.[7] It is doubtful whether this would have had much legal effect[8] and the President of the Board of Trade in rejecting the amendment emphasised that the Government was willing to be judged on its record. That there is a new spirit abroad is evidenced by the expansion of the motor industry into the development districts.[9]

There is however an even more fundamental question as to whether the powers under the Act are not altogether too narrowly conceived. As Mr. Lee pointed out on Second Reading[10] the problem today is not just one of local unemployment but of whole industries such as coal, cotton and shipbuilding which are on the decline and need replanning. Further, there is the technical revolution of automation and the problem of the depopulation of the rural areas. The Opposition therefore wanted the proper distribution of industry to be one of the purposes for which the powers in Part I could be exercised.[11] The Government was adamant in rejecting such an amendment. It is opposed to spending the taxpayers' money except for the purpose of bringing employment to the development districts, though in exercising the negative powers under Part II the Act provides that the Board of Trade is to have regard to the proper distribution of industry. There is here a doctrinal difference as to the extent to which it is justifiable to steer private industry to areas where it does not want to go. The difference lies in whether this should be a limited power to alleviate local unemployment or a wide power to be used to ensure the proper distribution of industry over the country as a whole. The practical consequence may be seen in the recent announcements about the motor industry which has been successfully steered to

[7] H.C. Deb., Vol. 614, col. 1015.

[8] See Griffith and Street, *Principles of Administrative Law*, 2nd ed., p. 296 *et seq.* for a discussion on the analogous problem of enforcing against a public corporation general duties owed to the public.

[9] On January 21, 1960, it was announced that the B.M.C. is to have new factories in Scotland, S. Wales and Merseyside. The buildings are to be erected by the Government for £9 million to be repaid by the corporation over 15 years.

On February 9, 1960, Standard Triumph announced new extension on Merseyside.

On February 26, 1960, Vauxhall announced that it would expand on Merseyside.

[10] H.C. Deb., Vol. 613, col. 313.

[11] H.C. Deb., Vol. 614, col. 1071.

certain development districts (*e.g.* Merseyside) but not to others (*e.g.*, North-East England). When the powers under the Act come to an end after seven years (s. 1 (6)) there will be an opportunity for a radical rethinking of the fundamental problems raised by the changing face of industry.

Gabriele Ganz.

NOTES OF CASES

Irresistible Impulse and the M'Naughten Rules

In *Attorney-General for South Australia* v. *Brown*[1] the Judicial Committee of the Privy Council was presented with the opportunity to examine the question how far a defence that an otherwise criminal act was committed under the influence of an irresistible impulse is compatible with the defence that the accused was insane within the meaning of the M'Naughten Rules. Unfortunately the Board, it is submitted, failed to get to grips with the basic issues, and its decision scarcely improves the state of this difficult branch of the law.

Brown was a man aged about twenty-five years, who in November 1958 was engaged to work as a hand at a sheep station in South Australia. The manager of the station, Mr. Lord, lived there with his wife and two young children. Brown met him for the first time when he arrived there; four days later, in the evening, he picked up a rifle from the room of another hand, went to Mr. Lord's bedroom, and shot him. He was tried for murder and convicted; after the Supreme Court of South Australia had rejected an appeal, he obtained special leave to appeal to the High Court of Australia, which decided that the summing-up had been misleading and ordered a new trial. From this decision the Crown obtained special leave to appeal to the Privy Council, which reversed the High Court decision and restored the original conviction.

It was common ground that there was no apparent motive of any kind for Brown's act. He himself did not offer any explanation; he was asked by the police whether he knew at the time of his act that it was wrong, and he replied, "Yes, but I couldn't help myself." Two highly qualified psychiatrists gave evidence at the trial—Dr. Forgan for the defence, and Dr. Shea (in rebuttal) for the Crown. Both agreed that Brown was a schizoid personality, and it was not disputed that at the time of his act he knew its nature and quality. Dr. Forgan was of opinion that at the time of the killing Brown had lapsed into a very brief temporary attack of schizophrenia, and did not know that what he was doing was wrong. Dr. Shea, on the other hand, thought that there could not be an attack of schizophrenia of such brief duration; he gave an account of Brown's mental state at the time in terms which the High Court described as involving an abnormality of mind and an irrationality of conduct, although not amounting to a psychosis.[2] While it is not entirely clear whether Dr. Shea regarded Brown's mental condition as amounting to a

[1] [1960] 2 W.L.R. 588; [1960] 1 All E.R. 734.
[2] *Brown* v. *The Queen* [1959] Argus L.R. 808, 812.

"disease of the mind," in any event he thought that Brown knew that what he was doing was wrong.

In summing up, the trial judge twice instructed the jury that they might think that Brown was in truth raising a defence of "uncontrollable impulse." If this were so, he said, then it was his duty to inform them that such a defence was unknown to the law. It was this passage that the High Court found objectionable[3]; but to understand their criticisms, it is necessary to consider their interpretation of the M'Naughten Rules as expounded in earlier cases before them. This interpretation is not set out in full in the judgment in the instant case for, as the court explained, it was "probably undesirable to discuss the case at all fully," lest the judge at the new trial which was ordered should be embarrassed.[4]

The court's position was first expounded in the case of *Sodeman* v. *The King*[5] nearly a quarter of a century ago, and it has been consistently maintained ever since. It regards the M'Naughten Rules as posing two main questions in each case, namely (1) was the accused labouring under a defect of reason arising from a disease of the mind, and (2) if so, was the defect of reason such as to produce the result that the accused did not know the nature and quality of his act, or, if he did know this, that he did not know that what he was doing was wrong? It is in regard to the second limb of the second question that "irresistible impulse" may prove of importance. For, as Dixon J. put it, "in general it may be correctly said that, if the disease or mental derangement so governs the faculties that it is impossible for the party accused to reason with some moderate degree of calmness in relation to the moral quality of what he is doing, he is prevented from knowing that what he does is wrong."[6]

It will be observed that Dixon J. is here construing the word "know" as meaning "reason calmly about a proposition." If, as is submitted, his construction is the correct one, it must first be assumed that the word "know" is not self-explanatory. But this could scarcely be denied. "Knowledge" is a word covering a varying range of abilities, from that of being able to repeat a verbal formula to that of being able to reason about a proposition and act upon it. Thus in one sense a child who, when asked what twice two makes, replies "four" automatically, can be said to know that $2 \times 2 = 4$. In another sense, both the present writer and the Director of the

[3] The defence complained of various other passages in the summing-up, raising other questions, and these were also found objectionable by the High Court; and here again the Board overruled the High Court. These other matters are outside the scope of the present note, and no further reference will be made to them.

[4] [1959] Argus L.R., at 809.

[5] (1936) 55 C.L.R. 192; special leave to appeal refused [1936] 2 All E.R. 1138 (P.C.). Although in that case the four members of the Court were equally divided as to the result, the argument here set out was accepted by three of them (Latham C.J., Dixon and Evatt JJ.).

[6] (1936) 55 C.L.R., at 215.

Cavendish Laboratory "know" that the amount of energy contained in a given body of matter is represented by the formula $E=mc^2$, where E stands for the amount of energy, m stands for the mass of the body, and c stands for the velocity of light.[7] But the Director's knowledge of this proposition is of a very different order from that of the writer.

Once this is grasped, it becomes plain that a plea of irresistible impulse does not *necessarily* stand in opposition to a plea that the actor did not know that what he was doing was wrong. In any given case, it may be that that actor was able to, and did, reason with a "moderate degree of calmness" about the moral quality of what he was doing, but nonetheless felt that he had to do it, although he realised its wrongness; or it may be that the feeling of having to do it was so overpowering that he was unable to reason calmly about its moral quality. Which of these two is correct is for the jury to decide in the light of the evidence. But if, as happened in the present case, the two possibilities have not been developed in the course of the evidence, it is wrong for the judge to tell the jury (as did the judge at Brown's trial), in effect, that the correct interpretation of the evidence before them is the former of the two.

In explaining their reasons for ordering a new trial, the High Court used the following language: "[Domination by an uncontrollable impulse] may afford strong ground for the inference that a prisoner was labouring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong. The law has nothing to say against the view that mind is indivisible and that such a symptom of derangement as action under uncontrollable impulse may be inconsistent with an adequate capacity at the time to comprehend the wrongness of the act . . . . For that reason, even if no more had been said than that uncontrollable impulse does not amount to a defence, the fact that the subject was mentioned would make it necessary to put before the jury the true operation of uncontrollable impulse as a possible symptom of insanity of a required kind and degree."[8] It was this passage that the Board found objectionable. They regarded it as laying down "*as a matter of law* and in the absence of any medical evidence to that effect that irresistible impulse is a symptom of some disease or disorder of the mind which, although not preventing the patient from knowing the nature and quality of his act, yet does prevent him from knowing that it is wrong."[9]

With respect, it would seem that in making this criticism the Board misconceived the true operation of what the High Court was saying. Early in its judgment the court had made it plain that at the trial there was no real dispute as to the first of the two "key" questions, namely the existence of a defect of reason arising from

[7] *i.e.*, Einstein's Law.
[8] [1959] Argus L.R., at 814.
[9] [1960] 2 W.L.R., at 598.

disease of the mind [10]; the real issue arose on the second limb of the second question, *i.e.*, did Brown know that what he was doing was wrong? The whole of the judgment must be read in the light of this analysis of the course of the trial. Thus, when the High Court spoke of "the true operation of uncontrollable impulse as a possible symptom of insanity *of a required kind and degree*," it is the emphasised words which are important, since these refer to the "knowledge of wrongness." The Board, however, seem to have laid stress on the phrase "symptom of insanity," and to have imputed to the court the proposition that in the absence of any medical evidence the existence of an uncontrollable impulse is to be taken as demonstrating the existence of a disease of the mind. The High Court have never, to the writer's knowledge, announced such a proposition, and it is most unlikely that they would ever do so.

The Board, fortunately, did not shut the door on the defence of irresistible impulse; indeed, they went out of their way to say that it could be relied on if there were medical evidence in a given case that it could operate, and had operated, so as to prevent the accused from knowing that what he did was wrong. The *Sodeman* case, they said, provided an Australian example. They noted, however, that although there was in that case medical evidence to support the High Court's view of the nature of "knowledge of wrongness," the court did not regard the medical evidence as a necessary foundation for their view. And in that respect, they said, the court had erred.[11]

It is respectfully submitted that here the Board itself was in error. Doubtless psychiatrists acquire, as a matter of everyday experience, a familiarity with the different types and degrees of knowledge which is denied to the ordinary layman. But it does not follow from this that psychiatrists are alone competent to speak on these matters, which is the proposition laid down by the Board. That proposition is as far removed from the truth as is its opposite which the Board (mistakenly, it has been submitted) attributed to the High Court.

Indeed, running through the Board's opinion are several assumptions, namely, (a) that there exists an entity known as the "mind" (b) that this entity may become "diseased," (c) that the various "diseases" which may affect the "mind" are specific, separate, and identifiable, and (d) that each disease produces a specific

[10] While the trial judge apparently regarded Dr. Shea's evidence as negativing the existence of a "disease of the mind," the High Court seems to have thought that the tenor of his evidence revealed such a condition; for they remarked that the rejection of the view that Brown had suffered from schizophrenia did not necessarily dispose of the question whether there had existed a disease or disorder of the mind ([1959] Argus L.R., at 816). This remark doubtless reflects the view that the phrase "disease of the mind" is not a term of medical art, but rather a legal phrase requiring exposition before the medical evidence can be correctly appreciated. See, *e.g.*, Dixon, "A Legacy of Hadfield, McNaghten and Maclean" (1957) 31 Aust.L.J. 255.

[11] [1960] 2 W.L.R., at 599.

separate effect on the functioning of the "mind." The first of these assumptions is a philosophical, not a scientific, proposition; and this fact affects the following three. While it is true that many psychiatrists of high repute claim to be able to discern and identify specific diseases of the mind which produce specific results on the patient's behaviour, many others of equally high repute prefer to lay stress on the observable behaviour of the patient and regard the specific "diseases" classified by their fellows as artificial constructs. It would thus seem desirable, since the allegedly "expert" opinion is divided as to the fundamental concepts, for the law to pursue its own course; and this is the justification for the High Court's view that such terms as "disease of the mind," "defect of reason" and "know," are to be treated as legal terms of art which have to be explained to the psychiatrist and the jury before they can be fitted to observations of the accused's behaviour and deductions therefrom.

One may hazard the guess that the Board's opinion, with its stress on the need for a foundation of medical evidence in each case, will result in future pleas becoming even more like games of chance than they are at present; much will depend on the accused's finding a psychiatrist who is articulate about the assumptions of his discipline, as well as a counsel who is fully conversant with the problems. From this aspect alone, the decision is to be regretted. But it also raises some wider questions.

The Board has said again and again in the past that it does not sit as a general court of criminal appeal, and grants of special leave to appeal in criminal cases are rarities.[12] Even rarer is a grant of such leave to the Crown. In the present case, it would seem that leave was granted because it was thought that the decision of the High Court raised questions of "great importance and far-reaching consequences in the administration of the criminal law." [13]

This being so, it was surely the duty of the Board to consider all relevant arguments and authorities from all jurisdictions, and to arrive at a carefully reasoned conclusion, so as to settle the law. Since neither the Board itself nor the House of Lords had previously dealt with the question, there was nothing to stand in the way. But what the Board in fact did was to dispose of these questions of great importance and far-reaching consequences by using some very superficial reasoning, supported by reference to two decisions of the English Court of Criminal Appeal.[14] It is true that the attitude of

[12] See 9 *Halsbury's Laws of England* 395 (3rd ed.).

[13] [1960] 2 W.L.R., at 598.

[14] *R.* v. *Kopsch* (1925) 19 Cr.App.R. 50; *R.* v. *Rivett* (1950) 34 Cr.App.R. 87. That the Board, despite what it called the "very full and helpful argument" of counsel, adopted a superficial approach is implicit in the fact that nowhere is any reference made to the conflict between the High Court decision in *Stapleton* v. *The Queen* (1952) 86 C.L.R. 358 (holding that "wrong" in the M'Naughten Rules means morally wrong, or wrong according to the reasons which to ordinary people make an act right or wrong), and the Court of Criminal Appeal decision in *R.* v. *Windle* [1952] 2 Q.B. 826 (holding that "wrong" means "contrary to law"). It would seem that the

the High Court is quite different from that of the Court of Criminal Appeal on this matter. But it does not follow from this that the latter court is necessarily right and the former court wrong. Yet what the Board did in this case was merely to bring the High Court into line with the English courts, without investigation of the fundamental questions.

There are some basic questions involved in an approach of this kind. Is there only one entity, "the common law"? Or is there a common law of Australia, a common law of New Zealand, and so on? The Board seems to have assumed that there is in fact only one common law. Let this be assumed; it does not follow that the common law is what the English courts have declared it to be. The Court of Criminal Appeal is not, even in England, the ultimate authority on matters criminal. And whatever justification there might be for a policy on the Board's part of automatically following the decisions of the House of Lords, there cannot be anything to be said for its assuming that decisions of the lower English courts are to control the development of the law.[15]

Indeed, at the present time there would be much to be said for the opposite assumption. It is the almost invariable practice of appellate courts in Australia to reserve their decisions and to give them the most anxious consideration, sometimes extending over weeks or even months. Almost inevitably the reasoning in the decisions of these courts tends to be superior to that of the lower English courts, which do not give the cases coming before them the same lengthy and anxious consideration.

What the Board failed to do in the *Brown* case is thus perhaps of even greater importance than what it did. Unless in future appeals it gives some clear sign that it is appreciating the nature of its task and endeavouring to discharge the burden fairly and adequately, it may prove difficult for it to retain unimpaired its present appellate jurisdiction.

P. Brett.

Conditions and Promises

We have recently been strongly reminded of the errors that may be committed if it be assumed without examination that the concepts used in one branch of the law are the same as those that operate in

High Court's opinion as to the meaning of "wrong" is fundamental to its further reasoning on irresistible impulse; for knowledge that an act is contrary to law is, in general, the kind of knowledge involved in a automatic response to a question, rather than the kind of knowledge that calls for calm reasoning. Since neither of these cases was cited to the Board, it may be questioned whether the argument was as full and helpful as the Board supposed.

[15] This is especially true when the question at issue is one which, so far as the English courts are concerned, is ceasing to become a live issue. The M'Naughten Rules are still of great importance in Australia; but since the passing of the Homicide Act, 1957, they are gradually ceasing to play a controlling part in the English courts.

another branch.[1] There may be differences even in the concepts which are denoted in the different branches by the same words. It is logically possible that the nature of "conditions" in property law might be quite distinct from that of "conditions" in contract law. Since leases create property interests it might be that the distinction between "conditions" and "covenants" drawn in relation to them might not correspond to the distinctions between "conditions" and "promises" specified, *e.g.*, in the American *Restatement of Contracts*. This latter distinction, as was submitted in an earlier case note,[2] is, despite the unfortunate terminology we often employ, inherent also in English law. It is now submitted that the distinction between conditions and covenants in leases, drawn by Lord Jenkins in his opinion in *Bashir* v. *Commissioner of Lands*,[3] is the distinction between conditions and promises that operates in the law of contract. A lease has often a dual character of being both contract and conveyance, and the present case is of interest both to contract and to property lawyers.

The case is also of interest to comparative and constitutional lawyers. It was an appeal to the Judicial Committee of the Privy Council from the Court of Appeal for Eastern Africa, which had reversed a decree of the Supreme Court of Kenya. It was concerned with the application of section 83 of the Crown Lands Ordinance of Kenya of 1915. This section provided that:

> "if there shall be any breach of the lessee's covenants . . . the commissioner may serve a notice . . . specifying . . . the covenant of which a breach has been committed, and . . . may commence an action . . . for the recovery of the premises, and . . . the Court shall, subject to relief on such terms as may appear just, declare the lease forfeited, and the commissioner may re-enter upon the land.
>
> In exercising the power of granting relief against forfeiture under this section the Court shall be guided by the principles of English law and the doctrines of equity."

A strong Judicial Committee (Lord Cohen, Lord Denning and Lord Jenkins) held that the phrase "principles of English law" was not confined to the common law. "In their Lordships' opinion, the reference to English law must extend to statute law, inasmuch as relief from forfeiture is virtually the creature of statute. This means, in effect, that the court is to be guided . . . by the principles laid down by section 14 (2) of the Conveyancing

[1] See Hancock, "The Fallacy of the Transplanted Category," 37 Can.B.R. 535.

[2] 23 M.L.R., p. 434.

[3] [1960] A.C. 44: [1960] 1 All E.R. 117. My quotations will have *All England Law Reports* references because of their more precise letter division of a page. I shall continue to suggest that other law reports should embody such a recognised bibliographical device as the division of a page. Too much time is lost in reading through a page to find a dictum of a few sentences. My own preference is for the numerical indications of lines—10, 20, 30, etc.—as used in the *Northern Ireland Law Reports*, and printed poetry.

Act, 1881 and the decisions of the English courts under that section."[4] The substance of the case was that the appellant had received what was termed a grant of land in Nairobi for ninety-nine years. This contained, to use for the present a neutral term, a number of stipulations concerned with the building of an hotel on the site within thirty-six months of the commencement of the terms. These stipulations were not observed. The Commissioner of Lands contended, and the Court of Appeal for Eastern Africa supported him, that the stipulations were not " covenants " within the meaning of section 83 of the Crown Lands Ordinance, and that consequently the court had no power to grant relief against forfeiture. His positive contention was that the stipulations were " conditions " whose non-fulfilment automatically brought about a forfeiture giving him a right of re-entry.[5] The Court of Appeal granted him a declaration that the appellant's title had been extinguished.

Much of the argument in the case, and of the opinion of the Judicial Committee, was, of course, concerned with the details of the terms of the stipulations and particular provisions of Kenya Ordinances. But the broad considerations were these. The commissioner relied on the fact that in the grant the stipulations in question were set out under the heading " Special Conditions," and that the Ordinances spoke of " covenants " and " conditions " and " terms " in such a way as to draw distinctions between them. In particular, the Ordinance of 1915 spoke of " building conditions " contrasted with "covenants," so that the stipulations in question, concerned as they were with building, could not be regarded as covenants.

The Board accepted as good doctrine a conceptual distinction between " covenant " and " condition." The Board defined the concept of covenant as " an obligation laid on [an obligee] which he is to be contractually bound to observe or perform."[6] For the

[4] [1960] 1 All E.R. at p. 127G. The reference is to the 1881 Act as the Act in force in 1915 when the Kenya Ordinance was passed. The Act is, of course, repealed and the section replaced by s. 146 of the Law of Property Act, 1925: but, as Lord Jenkins said " a Kenya ordinance could hardly be taken . . . to adopt in advance future English legislation of unknown content." The cases on the 1925 Act are, however, relevant as expositions of the 1881 Act.

[5] " On the footing that the stipulation in question was a covenant within the meaning of section 83 it was only by invoking that section that the commissioner could assert a claim to forfeiture for its breach. On the other hand if the commissioner could succeed in making good his primary contention that the stipulation in question was a condition . . . forfeiture . . . was automatically bought about through the non-fulfilment of the condition . . . and the court would have no jurisdiction to grant the appellant relief . . .": Lord Jenkins: [1960] 1 All E.R. at p. 120D.

[6] *Ibid.* at p. 123D. It is doubtful whether any significance should be attached to the use of the two words " observe " and " perform." They may be correlated with " do " and " forbear," or with undertaking to perform by doing or forbearing and undertaking to be responsible for a state of affairs not brought about by the undertaker's doing or forbearing (or, as in the case of Holmes' promise that it will rain tomorrow, anybody else's doing or forbearing), or with the gravedigger's " to act, to do and to perform."

concept of condition they accepted the definition of the President of the Court of Appeal for Eastern Africa, Sir Kenneth O'Connor: "At common law a condition is a qualification annexed to an estate, whereby the latter shall be created (condition precedent), enlarged, or defeated (condition subsequent) upon its performance or breach." [7] Sir Kenneth did not point out that a condition thus defined did not *per se* impose an obligation of observance or performance, but he did point out that breach of a condition subsequent gave the lessor a right of re-entry, whereas breach of a covenant only gave a right to recover damages or obtain an injunction. The Board rejected the fallacy of equating every use of the word "covenant" or "condition" with the concepts so defined. Of the stipulations in the lease Lord Jenkins said: "the mere fact that they are described as conditions is by no means conclusive of their character." [8] Of the words of the Ordinance he said: "Having considered all the various references to 'covenants,' 'conditions' and 'terms' which are to be bound in the Ordinance of 1915, their Lordships are unable to hold that this enactment draws any clear-cut or consistent distinction between the word 'covenant' as meaning an obligation laid on the lessee which he is to be contractually bound to observe or perform, and the word 'condition' as meaning a stipulation which the lessee may fulfil or not as he chooses, but which, if not fulfilled, is to operate as a condition of defeasance." [9] The conclusion was that "the appellant contracted obligations to observe and perform the special conditions which amounted to covenants for the purposes of section 83." [10] The Board finally held that the case was one in which the appellant should be granted relief against forfeiture.

The approach so far has been that of classifying provisions as being either covenants or conditions. But the Board, very rightly and importantly, considered a third possibility, *viz.* of a provision operating both as a covenant and a condition. They pointed out that in many leases there is an express provision for re-entry in the event of the breach of a covenant.[11] There was no such provision for re-entry in the present grant: but various provisions in the

[7] *Ibid.* at p. 120I. [8] *Ibid.* at p. 125A.

[9] *Ibid.* at p. 123D. This proposition was used by the appellants to advance their contention that even if the "special conditions" did constitute conditions they came within s. 83, because the word "covenant" in s. 83 was not tied to covenants which were obligations, and included conditions of defeasance. This contention was rejected: see *ibid.*, at p. 123I.

[10] *Ibid.* at p. 126I. They considered that the word "conditions" when used in the phrase "special conditions" in the grant, and in the phrase "builders conditions" in the Ordinance, signified no more than "terms, or requirements, or stipulations." *Ibid.* at p. 123E.

[11] "The special conditions might combine in themselves the dual character of covenants and conditions of defeasance. . . . This combination of covenant and condition is commonly brought about by the usual express provision for re-entry. . . . It would, however, also be brought about by any form of words importing an intention that a given stipulation should possess this dual character." *Per* Lord Jenkins at p. 121E.

Ordinance, and indeed section 83 itself, gave rights of re-entry in specified circumstances for breach of covenants in leases.[12] In the view of the Board, however, a right to relief against forfeiture existed in all cases of covenants, whether they were examples of provisions with the simple character of covenants or provisions with a dual character of being both covenants and conditions.[13]

This distinction between covenants and conditions in a lease is but a species of the general distinction between promises and conditions in all kinds of contracts. The definition of promise in all contracts is that of a provision agreed to by a promisor constituting an obligation to perform: or, as I have previously defined it, "an undertaking by the promisor to act or forbear in some specified way in the future."[14] The general definition of a condition cannot, however, be so simply translated from the law of property: it cannot be said to be generally "a qualification annexed to an *estate*." A condition in the law of contract is a qualification annexed to the right of the promisee or the duty of the promisor,[15] specifying circumstances in which the right (or duty) may be created (condition precedent) or defeated (condition subsequent).[16] It would be better to consider the elements of a contract as promises, and conditions as parts of promises annexed to a primary part. A promise to accept a horse provided it is sound cannot in substance be severed, but it is convenient to regard the proviso as a conceptual entity—a condition. It would also be convenient if the remainder of the promise which thus has been converted into a conceptual entity to which the condition is annexed were to receive some name different from that of "promise." But no such term has been invented: instead the provision for the promisor to accept a horse is itself called a promise. Thus the terms of a contract can be classified as either promises or conditions. The distinction between "promise" and "condition" is fundamental in the law of contract: and it remains fundamental even though some terms of a contract may combine the characteristics of promise and condition, just as provisions in a lease may combine the characteristics of covenant and condition. In *Bashir* v. *Commissioner of Lands* consideration was given to the aspect of the characteristic of condition being added to that of covenant. Equally, however, a problem may arise as to whether a provision which admittedly has the characteristic of being a condition also has the characteristic of being a covenant. Stipulations may refer, as Lord Jenkins said, to

[12] *Ibid.* at p. 124A.
[13] *Ibid.* at p. 123I and 127A.
[14] 15 Can.B.R. 311.
[15] These terms are strictly correlative, as Hohfeld pointed out. There is a claim-duty relation between promisor and promisee: the right of the promisor *is* the duty of the promisee, only we look at the relation from a different point of view. The situation is like that of the convex and concave aspects of the arc of a circle.
[16] Further distinctions can be drawn between limitations and conditions, between conditions precedent to performance and predecent to obligations: see 15 Can.B.R. 312 *et seq.*

acts to be done by a lessee, which impose no obligations on him, but non-compliance with which work a forfeiture.[17] They have the characteristic of condition if they work a forfeiture, but it may be a matter of interpretation whether an obligation is imposed to perform the acts. Where an obligation is imposed there is a provision with a dual character. In the general law of contracts also there may be conditions which involve the performance of some act—potestative conditions as I have termed them.[18] Such potestative conditions may be unaccompanied by an obligation to perform the act. I promise to give you £5 if I go to Rome, but I do not promise to go to Rome. Alternatively, I may promise to give you £5 if I go to Rome, and I may also promise to go to Rome.[19] There may be empirically a single provision about going to Rome. One can speak of this provision as having the dual characteristic of condition and promise. It is, however, perhaps better to speak of there being present the two conceptual entities of condition and promise: in such a way the confusion of section 11 of the Sale of Goods Act, 1893, may be avoided, and the law of dependent covenants simplified.[20] A full understanding of the logic of *Bashir's* case should help this development.

J. L. Montrose.

Frustration of c.i.f. Contracts

Tsakiroglou & Co., Ltd. v. *Noblee & Thorl G.m.b.H.*,[1] an appeal against two decisions on c.i.f. contracts affected by the closing of the Suez Canal in 1956, has made a rule relating to frustration more certain. It was laid down—with rare unanimity also as regards reasons for the decision—that a c.i.f. contract is not frustrated by the impossibility to use a contemplated shipping route even though the emergency route costs the seller a great deal more money and delays delivery to the buyer by several weeks. Possibly one may go a step further and say that a c.i.f. contract is frustrated in the circumstances if the new route—which in this case, as was pointed out by Sellers L.J., involved crossing the Equator twice—would adversely affect the cargo or require the shipper to assume fresh obligations of a new kind to avoid such adverse effect.

This appears to be the opinion of all the learned judges engaged in these cases, and not far removed from McNair J. in the first Suez case, *Carapanayoti & Co., Ltd.* v. *E. T. Green, Ltd.*,[2] which the

[17] [1960] 1 All E.R. at pp. 123D and 125E. [18] 15 Can.B.R. 322.

[19] Perhaps the more common kind of potestative condition is that where the act is to be performed by the promisee, not the promisor. I promise to give you £5 if you go to Rome. I promise to load a cargo on your ship if you bring your ship to port before January 1 (the cancellation clause in a charterparty). There need be no obligation to go to Rome: no obligation to have the ship in port by January 1.

[20] See 15 Can.B.R. 325.

[1] [1960] 2 All E.R. 160; [1960] 2 W.L.R. 869; see 22 M.L.R. 332.

[2] [1959] 1 Q.B. 131.

Tsakiroglou case overrules. The Note on the *Carapanayoti* case in this *Review* [3] drew attention to the learned judge's reference to new obligations that might fall on the seller, but expressed doubt about his holding that the contract had been frustrated, since there was no evidence that new obligations did in fact fall on the seller.

A subsidiary point was whether an arbitrator's finding that shipment by the emergency route was not fundamentally different from shipment by the customary route was open to review by the court. The trial judge had considered this to be a finding of fact by which he was bound, but the Court of Appeal held that it was a mixed question of fact and law. The finding establishes whether there is frustration, and this is a legal question for the court.

O. C. Giles.

Evidence of Foreign Law and the Writing on the Wall

In *Callwood* v. *Callwood*,[1] the Judicial Committee of the Privy Council was confronted with the following intriguing, if somewhat intricate, family dispute concerning the ownership of Great Thatch Island, which is British territory in the West Indies and forms part of the Virgins group. The events which led up to this dispute were these: one R. E. C. Callwood, a lifelong British subject, was domiciled at the date of his marriage to the respondent (the ceremony took place in London in 1905) in another of the Virgin Islands—St. Thomas. This island seems to have constituted the intended matrimonial domicile, for, although R. E. C. Callwood died in Germany (where he had gone to live in 1913) in January 1917—the respondent surviving him—he was found not to have abandoned his domicile in St. Thomas. St. Thomas was a Danish West Indies colony under Danish law both in 1905 and 1917.[2] According to the Danish law this marriage had the effect of subjecting the property of each spouse to the Danish régime of community of property between spouses, since no express settlement of their respective property had been entered into. Further, according to Danish law, a surviving widow might be empowered by her husband's will to retain the whole joint estate of the two spouses undivided with their children until her death or re-marriage—thus postponing the rights of children or other heirs in the community property. This right to retain was in fact given to the widow by a joint will of herself and R. E. C. Callwood which had been executed in April 1911, in conformity with Danish law. By that law, moreover, the widow would be entitled (subject to restrictions which need not detain us here) to deal with the retained property more or less as absolute

[3] 22 M.L.R. 81.

[1] [1960] 2 W.L.R. 705; [1960] 2 All E.R. 1.

[2] The Danish Virgin Islands were, in fact, ceded to the United States of America on March 31, 1917, that is, some weeks after the death of the testator. Danish law, however, continued to be in force there until July 1, 1921.

owner. On the death of his father intestate in 1902, R. E. C. Callwood had inherited Great Thatch Island, taking it as his father's heir at law under the English law of inheritance in force at the time with respect to freehold land. This island was still vested in R. E. C. Callwood at the time of his own death.

In 1948, the appellant, who was the only son of the respondent and R. E. C. Callwood, was granted a twenty-five-year lease of Great Thatch Island by one Kean, who purported to act in the matter as agent of the respondent. Quite apart from any question of Kean's authority to grant it, this lease was admittedly not duly executed and had not been duly registered. The son nevertheless remained in possession of the island on the strength of this invalid lease—and, moreover, paid no rent to his mother for it. It must also be pointed out that the above-mentioned joint will made no reference *expressis verbis* to Great Thatch Island with the result that the will could only deal with that island if it could be found (as the widow throughout contended should be found) that the Danish community régime attached to it (and not the English law as *lex situs*) and that it was included in the general references to " our whole joint estate " and " our joint estate " appearing in the will.

The respondent widow commenced an action in the Supreme Court of the Windward Islands and Leeward Islands, claiming a declaration that Great Thatch Island was her property by virtue of the terms of the joint will, for possession of the island and for damages for its use and occupation. The trial judge ordered the appellant to give up possession to his mother and awarded her $2,880. On appeal to the Federal Supreme Court of the West Indies, his judgment was upheld, though the mesne profits were reduced to $840. Special leave to appeal having been granted, the appellant contended before the Board [3] that the joint will did not effectively pass Great Thatch Island to his mother since it had not been proved to be part of the community property and that, he being the only son of R. E. C. Callwood, it devolved on him as the latter's heir at law according to English law, the *lex situs*. The case thus finally turned on the very simple question: did the Danish régime of community of property attach to Great Thatch Island—that is to say, did it embrace immovables situated, not in Danish territory, but in territory of a non-Danish state possessing no such régime of community of property, movable or immovable?

The respondent, of course, bore the burden of proving the Danish law on this point. It seems that she was advised to put before the Board as such evidence the judgment of the United States Court of Appeals (3rd circuit) given by Maris J. in the case of *Callwood* v. *Kean* [4]—as approved by an affidavit of a practising attorney and counsellor at law of the Virgin Islands of the United States of

[3] Consisting of Lords Tucker, Jenkins and Morris of Borth-y-Gest.
[4] (1951) 189 F. 2d 565.

America—to the effect that the Danish law on the question now before the Board was as stated in the opinion of Maris J. The plaintiff in these American proceedings was the respondent in the present case; the defendant was her former agent who, as has been pointed out, had purported to grant the lease of Great Thatch Island to the present appellant. The suit was brought for an account of the proceeds of sale of certain immovable property *situate in the Island of St. Thomas* forming part of the community property. The appellant in the present suit, however, seems to have been permitted to intervene in these American proceedings and they thereupon developed into a full-scale dispute confined to the question of who was entitled to these proceeds of sale.

It is small wonder, therefore, that their Lordships are reported as having strongly deprecated this mode of providing evidence of foreign law.[5] As Lord Jenkins said[6]: "The discussion of the Danish law of community in the United States Court of Appeals was directed to the particular matter in hand, *viz., the destination in view of that law of the proceeds of sale of a particular piece of immovable property admittedly situated in territory which at the material time was Danish territory and accordingly subject to Danish law.* The judgment of the United States court, accordingly, provides no answer to the vital question whether in the eye of Danish law the property of spouses to which the rules of community attached on their marriage included immovable property such as Great Thatch Island, not situated in Danish territory but in the territory of a foreign sovereign state whose own law with respect to immovable property so situated did not include the Danish or any other system of community." He continued later in the same vein thus[7]: "Their Lordships are satisfied that there is nothing in [the American] judgment which can be regarded as evidence that the Danish system of community in force in the Island of St. Thomas at the material time applied in the eye of Danish law to land situate in foreign, or, in particular, British territory. It is true that in various parts of the judgment general references are to be found (for example) to 'the property,' 'the entire joint estate,' and 'the community property' without qualifying words restrictive of their locality; but this . . . is not enough." Having observed that the law of one country concerning the devolution of land was not prima facie intended to affect the devolution of land situated in another country, he pointed out that it could not be assumed that, had the question whether Great Thatch Island was part of the community property been before the American court, it would have answered that question in the affirmative.

His Lordship then proceeded to consider the well-known

[5] At p. 711.
[6] At pp. 711–712. Italics supplied.
[7] At p. 716.

decisions in *De Nicols* v. *Curlier* (*No. 2*) [8] and *Chiwell* v. *Carlyon*.[9] These, he considered, were to be distinguished on the ground that the foreign community régimes had in each case been satisfactorily [10] and expressly proved to extend to immovable property situated in England—in other words that they had extraterritorial operation. He added that these two cases did not, of course, answer the question in the present case whether the Danish régime in force in St. Thomas at the material time included immovables situated in other countries. He did, however, suggest that, had it been satisfactorily proved that the Danish régime did attach to Great Thatch Island, the Board might have been prepared to agree that that island would have passed under the general references in the will.[11] But even so, he observed, that would not of itself conclude the case in the respondent's favour, for, even if one assumed that the will had been validly executed [12] for the purposes of passing the beneficial interest in Great Thatch Island, as part of the joint estate, which it was alleged to pass to the respondent, there still remained the nice question whether or not it was proper in the circumstances to "resolve the conflict between English law and Danish law with respect to the devolution of Great Thatch Island otherwise than by applying the *lex situs* (*i.e.*, English law) in accordance with the general rule: see, for example, *Welch* v. *Tennent*.[13] "[14] The matter was not, however, debated further since the Board thought that the case was concluded against the respondent by reason of her failure to prove that Great Thatch Island formed part of the joint estate. It therefore advised that the judgments of the courts below be set aside and that the respondent's action be dismissed.

There is, indeed, nothing to quarrel about over the result of this litigation. One of the arts of a conflict lawyer is to be able to discern not only what foreign law requires to be proved before some particular court but also the extent to which proof thereof is required. There was no question here of applying the rule that foreign law, if not proved, will be taken to be the same as the *lex fori*. The respondent here lost her case for the simple reason that both the method and the extent of her proof of Danish law were defective and inadequate. And therein lies the chief moral of the decision.

[8] [1900] 2 Ch. 410.

[9] (1897) 14 S.C. 61 (South Africa). The case, however, concerned land in England and is fully discussed by Cheshire, *Private International Law* (5th ed., 1957), pp. 507-509, and by Dicey, *Conflict of Laws* (7th ed., 1958), pp. 525-527.

[10] See, however, at pp. 716-717, where Lord Jenkins takes Kekewich J. to task for having suggested in the *De Nicols* case ([1900] 2 Ch. at p. 414) that the mere absence of express words in the French Code restricting the community régime to immovables situated in France would of itself be enough to permit him to hold that it extended to immovables outside France.

[11] At pp. 717-718.

[12] The respondent must have been relying on the American case as proof of this as well.

[13] [1891] A.C. 639 (H.L.).

[14] At p. 718.

However, the case does reveal a problem of application of laws in time as well as in space. It will be recalled that R. E. C. Callwood had married and had died at dates when Danish law was still in force in the island of his domicile. By the time of the American litigation and of the dispute under review, a common law Code had replaced Danish law there. Quite correctly, the new Code was ignored in both suits.[15] The question is, however, raised as to how one should prove a foreign law which has been superseded in some particular place but is still extant elsewhere as opposed to a foreign law (such as Russian Tsarist law) which is superseded and no longer anywhere extant. In this case, the expert witness had indeed practised in St. Thomas (barring a break from 1946 to 1954, during which he served in the Department of Trusteeship of the United Nations) since 1934—seventeen years after the death of R. E. C. Callwood and thirteen years after the introduction of the new common law Code into St. Thomas. No doubt he would be very likely to be conversant with Danish law owing to the fairly recent change in the local legal system as well as with the new common law Code; but it cannot escape our notice that he was not practising in St. Thomas while Danish law was in force there. In indicating its general disapproval of the mode of providing evidence, it is a pity that the Board did not see fit to itemise more precisely its objections. There is nothing in the report of the case, or in the expert's affidavit, to the effect that he was skilled in Danish law, but we are left with no clear impression as to whether it was one of the *casus belli* that he was not sufficiently expert.

P. R. H. Webb.

Ackroyd & Sons *v.* Hasan Affirmed

In *Ackroyd & Sons* v. *Hasan* at first instance [1] Winn J. rejected the plaintiff estate agents' claim for commission. His decision has now been affirmed by the Court of Appeal,[2] but on different grounds.

The contract between vendor and estate agents provided that

> " . . . in the event of our introduction of a party prepared to enter into a contract to purchase on the above terms or on such other terms to which you may assent you will allow us commission."

The Court of Appeal disagreed with the view of Winn J. that the phrase " a party prepared to enter into a contract " was a " nullity in law " and should be construed as " a party who enters into a contract," and the case turned on whether the signed contract

[15] See *Re Aganoor's Trusts* (1895) 64 L.J.Ch. 521; *In the Estate of Pikelny, deceased*, noted by Lyons in (1955-56) 32 B.Y.B.I.L. 288; and *cf. Lynch* v. *Provisional Government of Paraguay* (1871) L.R. 2 P. & D. 268.

[1] [1959] 1 W.L.R. 706; [1959] 2 All E.R. 370. Noted (1959) 22 M.L.R. 689.

[2] [1960] 2 W.L.R. 810; [1960] 2 All E.R. 254. Leave to appeal to the House of Lords was refused.

submitted by the prospective purchaser was "on the above terms or on such other terms to which you may assent."

The contract was clearly not "on the above terms" since the original price, quoted at £12,000, had been reduced in the course of negotiations to £9,750. The terms in the contract were, so far as was then known to the solicitors of both parties and to the estate agents, approved by the vendor. But it emerged for the first time when the vendor's solicitor saw his client to secure the execution of the contract that the vendor desired to retain possession (under a lease of the second floor which was to be granted by the purchaser on completion) of a store on the first floor. The purchaser would not agree to this, and the vendor therefore declined to proceed with the sale. Could it be said that the vendor had assented to the terms in the draft contract?

On this point Winn J. had held that the vendor's assent must be "an assent given with the intention of being contractually bound." Since the vendor did not intend to be contractually bound there was no assent. The Court of Appeal unanimously agreed that, on the facts, the vendor had never assented to the whole of the terms in the contract signed by the purchaser, but were not so clear as to whether the assent must be a contractually binding assent: Upjohn L.J. disagreed with the trial judge, Ormerod L.J. was silent on this issue, and Sellers L.J. was "not at present satisfied that he [Winn J.] was wrong," reserving consideration of the question should it arise on another set of facts.

AUBREY L. DIAMOND.

COTMAN *v.* BROUGHAM AND THE ULTRA VIRES RULE

THE recent decision of the Supreme Court of New Zealand in the case of *Christchurch Corporation* v. *Flamingo Coffee Lounge Ltd.*[1] shows up the vagaries of the *ultra vires* rule and affords an intriguing contrast with (say) *Re Jon Beauforte (London) Ltd.*[2]

The facts were that Flamingo Coffee Lounge Ltd. (hereinafter referred to as "the company") was incorporated in 1951 as B. Allen (Textiles) Ltd. to deal in textiles of all kinds, clothing, buttons, costume jewellery of all kinds, to carry on the business of drapers, cloth manufacturers, furriers, tailors, mercers and dressmakers, and to carry on similar associated businesses. In February 1958 the company's name was changed to Flamingo Coffee Lounge Ltd. and it began to engage in the business of running a restaurant and coffee lounge. The Registrar of Companies registered the change of name, apparently without inquiry, and no other alteration was made in the Memorandum of Association.

[1] [1959] N.Z.L.R. 986. In relation to the matters in question in this case, the law of New Zealand is the same as that of England.

[2] [1953] Ch. 131.

In 1959 the company tendered for and obtained the right to operate the restaurant at the Christchurch airport, and it was after this that doubts arose whether the company had powers under its Memorandum to enter into this contract with the City Corporation. Proceedings were accordingly taken to determine the question.

Sub-clause 13 of the Objects clause of the Memorandum, however, read as follows:

> "To acquire or obtain from, or make any arrangement with any government or authority, supreme, municipal, local or otherwise, or any corporation, company or person, for any authority, right, privilege, concession, contract or charter which this company may think it desirable to obtain, etc.,"

and sub-clause 36 was similar in wording and identical in effect to the corresponding clause upon which the decision of the House of Lords in *Cotman* v. *Brougham* [3] was based, that is, in effect, that each of the sub-clauses in the Objects clause of the Memorandum was to be read in isolation as an independent object not limited by reference to any other sub-clause—at least so far as concerned third parties.

Haggitt J. accordingly regarded himself as obliged to hold that by reason of sub-clause 36, sub-clause 13 represented a main object; and since the transaction with the Corporation represented the obtaining of a "privilege" or "concession" within that sub-clause, the agreement was held to be *intra vires* the company.

This disposed of the particular point in issue in the case, but left outstanding the business of the restaurant other than the one at the airport—what may be described as the "parent" restaurant. As to this, sub-clause 35 provided as follows:

> "To do all such other things as in the opinion of the company may be incidental or conducive to the attainment of any of the foregoing objects or the exercise of any of the foregoing powers."

Since, then, the parent restaurant may be described as conducive to the attainment of the object under sub-clause 13, the running of the parent restaurant also is *intra vires*.

In the light of such a situation, one cannot help wondering what value there can be in (a) a precise Objects clause, or (b) an *ultra vires* rule. The classical justification for these appears in *Cotman* v. *Brougham* itself, where Lord Parker of Waddington said, "The Memorandum is intended to serve a double purpose. In the first place it gives protection to subscribers who learn from it the purposes to which their money can be applied. In the second place it gives protection to persons who deal with the company and who can infer from it the extent of the company's powers." [4]

[3] [1918] A.C. 514.
[4] [1918] A.C. 514, 520.

Such a statement, in the light of *Re Jon Beauforte (London) Ltd.*[5] and the present case, has ceased to have any real meaning. Surely these cases illustrate that it is high time that the recommendations of the Cohen Report be adopted, namely that the company should, as regards third parties, have all the powers of an individual.[6] This would bring a degree of reality to an increasingly artificial situation.

Hamish R. Gray.

Non-disclosure and Implied Term

Compagnie Algérienne de Meunerie v. *Katana Societa di Navigazione Marittima*,[1] illustrates how close implying a term in a contract may lead to declaring that contract one of utmost good faith; indeed, had the facts of this case been slightly more in favour of the charterers this charterparty, at any rate, might well have been declared a contract of the utmost good faith.

It all happened because some considerable time before the charterparty the ship had traded with Israel, a fact which a keen Syrian port official spotted in the ship's log after she had arrived at a Syrian port. The *Nizetti* had been chartered to carry a cargo of grain from Lattakia, in Syria, to Algeria. On arrival at Lattakia her previous trading with Israel was discovered, and the master was not allowed to land and to begin loading. Two days later the Syrian Government banned grain exports to Algeria. Had that been all, the case would probably never have come before a court, for it would have been a clear case of frustration. But the events before the conclusion of the charterparty and between the ship's arrival and the embargo complicated the issue.

Two days after arrival at Lattakia the master, on instructions from the owners, signed a declaration promising not to co-operate with Israel in future. But he was too late; the embargo was imposed, except for vessels that had begun loading. Without the complications loading would have begun and the ship would not have been affected. The charterers claimed damages from the owners, arguing that the latter should have disclosed their vessel's previous trading with Israel. Since a charterparty is not normally a contract of utmost good faith, this argument could only be based on the contention that it was an implied term of the charterparty that the vessel had not previously traded with Israel. The action failed. The court applied *Comptoir Commercial Anversois* v. *Power*,[2] where Scrutton L.J. had said that the implied term must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken

[5] [1953] Ch. 131.
[6] Cmd. 6659, para. 12.
[1] [1960] 2 W.L.R. 719; [1960] 2 All E.R. 55.
[2] [1920] 1 K.B. 899.

for granted. In this case the ship, after having traded with Israel, had passed through the Suez Canal on more than one occasion; every time the master had been asked to sign a non-co-operation declaration, which he had done, and the delay had been very slight. The owners therefore had no reason to believe that their vessel would experience any difficulties on her chartered voyage. Moreover, in the words of Hodson L.J., it was "impossible to say what action they [the charterers] would have taken if they had known of the defect. The shipowners would, no doubt, say they had never had any trouble, and the charterers might have accepted the risk." The contract was accordingly discharged by frustration, not by breach by the owners.

The trial judge had held that the charterparty must contain an implied term that the shipowners would obtain whatever permission was necessary within a reasonable time. He came to the conclusion because the owners knew and the charterers neither knew nor ought to have known that permission might be needed. In the end even the trial judge dismissed the action on the ground that when the embargo was imposed a reasonable time in which to obtain permission to load had not expired. As related above the Court of Appeal came to the same conclusion for different reasons. At the same time, one has to bear in mind that the learned Lords Justices clearly attributed great weight to the owners' evidence that on previous occasions the delay had been slight, so that even the charterers, had they known all the facts, might well have agreed to run the risk. It would seem that had the earlier delay been more substantial the court may well have come to the conclusion that a term as that implied by the trial judge was "only not expressed because its necessity was so obvious that it was taken for granted."

It is true that what the trial judge implied was a term that the owners would obtain any necessary permission, but in substance that would have been a term relating to the past, namely that there had been no previous co-operation with Israel—in other words, the circumstances would have been the same as if the law had said that non-disclosure shall avoid the contract.

O. C. Giles.

Goods Damaged During Discharge

American decisions relating to the duration of the liability of a carrier under the United States Carriage of Goods by Sea Act, 1936, show a marked difference from the interpretation given to the corresponding provisions of the English Carriage of Goods by Sea Act, 1924. The latest reported case is *Green Truck Sales Inc.* v. *Høegh Lines*,[1] recently decided by the District Court for the Southern District of California, Central Division.

[1] (1960) 179 F.Supp. 562.

Article I(e) of the Schedule to the Carriage of Goods by Sea Act, 1924, states that the term "carriage of goods" "covers the period from the time when the goods are loaded on to the time when they are discharged from the ship." The definition in the United States Carriage of Goods by Sea Act, 1936, is identical.

The only English authority which directly concerns the interpretation of this provision is *Goodwin Ferreira & Co., Ltd.* v. *Lamport & Holt Ltd.*[2] In that case a cargo of cotton yarn had been loaded at Liverpool, and when it reached Bahia, it was put into a lighter into which it was to be conveyed from the ship's side to the Customs House on the wharf. Some machinery also destined for Bahia was put into the lighter. Some of it came out of its case and dropped into the bottom of the lighter, made a hole in it and let in sea water. This damaged the yarn to the extent of 80 per cent. of its sound value.

The cargo owners sued the shipowners for the damage which had been caused, and one of the contentions which the shipowners put forward was that, when the yarn was placed in the lighter, the sea transit was over, and therefore at that stage the Carriage of Goods by Sea Act, 1924, did not apply. Roche J. (as he then was) held that this contention was erroneous. He said that the discharge of the goods was not finished when they were put into a lighter if other goods were still being discharged into the same lighter to make up the load which was to start for the shore. He concluded[3]: "When it is contemplated that these goods are to form the lighter load with other goods, the discharge of the goods themselves within the meaning of the Act of Parliament is, in my judgment, going on so long as other goods are being raised into the lighter and stowed into the lighter alongside or on top of them.

In the 1950s the interpretation of Article I(e) was the subject of three American decisions. In 1953 in *Federal Ins. Co* v. *American Export Lines Inc.*[4] goods were being unloaded at Leghorn from a ship into a lighter, and whilst this operation was going on a sling-load of heavy steel pipes fell from the ship's tackle into the lighter and damaged them. The insurers of the cargo, who were subrogated to its owners, sued the shipping company for the damage caused, and were met with the plea that the action was statute-barred by reason of section 3 (6) of the Carriage of Goods by Sea Act, 1936, because more than one year had elapsed since the date of the accident. Giving judgment in the District Court for the Southern District of New York, District Judge Dimock observed[5]: "If the point is taken literally it must be overruled out of hand. The Carriage of Goods by Sea Act does not apply of its own force to

[2] (1929) 34 Ll.L.Rep. 192.
[3] At p. 194.
[4] (1953) 113 F.Supp. 540.
[5] At p. 542.

cargo after it has left the ship's tackle." He then went on to consider whether the action was barred by the provisions of the bill of lading or by laches, and decided that it was not.

From the report of the case it does not clearly appear that the steel was being loaded into the same lighter, nor is any help afforded on this point by the report of earlier proceedings in the same case,[6] for all that it states is that " some pipe from a following draft of cargo being discharged fell from a sling and struck the lighter." [7] District Judge Dimock cited *Goodwin Ferreira & Co., Ltd.* v. *Lamport & Holt Ltd.*[8] as being contrary to the opinion that he expressed, but did not refer to the fact that in that case both cargoes were being discharged into the same lighter. Whether that circumstance would have altered his view is not apparent.

In *Remington Rand Inc.* v. *American Export Lines Inc.*,[9] in 1955 District Judge Ryan in the same court followed Judge Dimock's decision. In this case the whole of a cargo of drums containing scrap film had been discharged at Bombay into two lighters lying side by side. Fire broke out on one of them and spread to the other, causing damage to the drums. The learned judge held that the Carriage of Goods by Sea Act, 1936, did not apply, but it may be noticed that in a dictum he said [10]: " ' Discharged from the ship ' . . . is accomplished by the act of transferring cargo from the main carrier to a chartered lighter, when that loading has been completed or while no other cargo is being loaded into the same lighter."

In 1957 in *Re Petterson Lighterage & Towing Corporation* [11] where a cargo of steel was damaged after it had been discharged into a lighter at New York, District Judge McGohey in the same Court held that the Carriage of Goods by Sea Act, 1936, " does not apply of its own force to a period after cargo has left the ship's tackle." [12]

In 1960 in *Green Truck Sales Inc.* v. *Høegh Lines* [13] a cargo of machinery and spare parts, both in crates, had been lifted from a vessel which had arrived at New York, by means of a derrick barge, and was being loaded on board some lighters. A strike of longshoremen was about to break out, and in the rush to clear the ship before it began, some of the cases of spare parts were dropped on to the lighters and damaged other cases which had already been loaded on them. District Judge Tolin held that the Act of 1936 did not apply because the cargo had gone beyond the ship's own tackle. He said that " the damage was not damage which occurred in carriage of goods by sea, but damage which resulted in the unloading operation." [14]

[6] *Federal Ins. Co.* v. *American Export Lines Inc.* (1953) 109 F.Supp. 819.
[7] At p. 820.
[8] *Supra.*
[9] (1955) 132 F.Supp. 129.
[10] At p. 137.
[11] (1957) 154 F.Supp. 461.
[12] At p. 467.
[13] (1960) 179 F.Supp. 562.
[14] At p. 564.

It is interesting to notice that the learned judge referred to *Remington Rand Inc.* v. *American Export Lines Inc.*[15] but did not mention the passage in the judgment referred to above, *viz.*, " when that loading has been completed or while no other cargo is being loaded into the same lighter." His decision is therefore directly contrary to that in *Goodwin Ferreira & Co., Ltd.* v. *Lamport & Holt Ltd.*[16]

If a similar case ever arises under the English Carriage of Goods by Sea Act, 1924, perhaps the courts may prefer to follow the American authorities, for there are no words in the Act itself to suggest that discharge is not completed if other goods are still to be unloaded into the same lighter.

E. R. Hardy-Ivamy.

Mistake of Identity in Contract

The New Zealand Court of Appeal has now delivered judgment [1] on the appeal in *Fawcett* v. *Saint-Mérat* (*Star Car Sales Claimant*) [2] and has upheld, by a majority, the decision of Hardie Boys J. though for reasons other than those which commended themselves to the learned judge.

The essential facts of this case were that the plaintiff, Mrs. Fawcett, sold a car to the defendant, Saint-Mérat, in payment for which he gave a worthless cheque. The plaintiff later signed judgment by default against the defendant and sought to have the car seized in execution. In the meantime, however, a woman whose real name was Diana Mary Doreen Davies, acting on behalf of Saint-Mérat, had sold, or purported to have sold, the car to Star Car Sales Ltd. For the purpose of facilitating this transaction Mrs. Davies had adopted Mrs. Fawcett's name, and the latter, as plaintiff, now contended that the result of this deception was to bring mistake of identity into operation thus preventing the formation of a contract with Star Car Sales. It followed from this, so the plaintiff contended, that property in the car still remained in the defendant Saint-Mérat and hence the vehicle could be seized in satisfaction of the judgment obtained against him.

Hardie Boys J. held against the plaintiff on the short ground that even if there had been operative mistake of identity it was not open to the plaintiff to found her case upon it since he held that it was never open to a third party

[15] *Supra.*

[16] *Supra.*

[1] [1960] N.Z.L.R. 406, *sub nom. Fawcett* v. *Star Car Sales.*

[2] [1959] N.Z.L.R. 952. Noted 23 M.L.R. 108 under the title " Mistake of Identity and a Third Party." The present writer wishes to express appreciation to Sir Kenneth Gresson, President of the New Zealand Court of Appeal, for sending copies of the appellate judgments prior to their appearance in the regular series of Reports.

> "to raise in the name of one of the contracting parties this question of mistake as to identity so as to have the contract avoided."

He went on to express the opinion that there had not in fact been operative mistake of identity.

The present writer ventured to express some doubt as to the correctness in principle of the learned judge's main ground of decision [3] and this doubt now seems to be justified by the fact that in the Court of Appeal, Gresson P. (in a dissenting judgment) explicitly rejects this rule as to third parties and the judges in the majority, Cleary and North JJ., make no allusion to it in their judgments, preferring to base their decision in favour of Star Car Sales Ltd. on the ground that the deceit practised by Diana Mary Doreen Davies did not result in operative mistake of identity.

In the previous note on this case, attention was drawn to the fact that the statement of facts did not make it clear whether or not Star Car Sales Ltd. had known of the existence of Mrs. Fawcett prior to their dealings with Mrs. Davies *alias* Fawcett.[4] It was pointed out that Dr. Glanville Williams had forcibly argued [5] that the absence of such prior independent knowledge of the existence of the person whose name was assumed by a deceiver should exclude any question of mistake of identity. The special interest of the judgment of North J. seems to lie in the fact that, though not referring to Dr. Glanville Williams' arguments on this point, the judgment now supplies judicial support for these contentions. The essential passage is as follows [6]:

> "In my view, the vital and, indeed, all-important matter was the representation made by Mrs. Davies that she was the true owner of the motor car. The name 'Mrs. Fawcett' meant nothing at all to the purchaser. All he was interested in was to ensure that he was dealing with the true owner, and indeed he was. His eyes as well as his mind rested on Mrs. Davies. In my opinion, then, the representation that the person present negotiating the sale was 'Mrs. Fawcett' amounted to nothing more than a false description and, if this be so, then, in my view what Lord Cairns described as a *de facto* contract came into being between Mrs. Davies and the respondent immediately they agreed on all necessary terms."

The learned judge was prepared to grant that this contract was voidable but he was not prepared to say that no contract at all came into existence. North J. also expressed the opinion [7] that there was no real parallel between the instant case and *Cundy* v. *Lindsay* [8] and raised the question whether the result in that case would have been

[3] 23 M.L.R. 108. See also 76 L.Q.R. 207.
[4] 23 M.L.R 111, n. 16.
[5] 23 Can.Bar Rev. 282–287.
[6] [1960] N.Z.L.R. at p. 426.
[7] *Ibid.*
[8] (1878) 3 App.Cas. 459.

the same if Blenkarn had practised the fraud to obtain goods in short supply and had sent cash with his order.

It may perhaps be thought that these opinions also tell heavily in favour of the opinion of Dr. Glanville Williams that mistake of identity, to be operative, must be material.[9] This question of materiality was much discussed at first instance before Hardie Boys J., and Dr. Goodhart [10] was cited for the view that it need not be material but the point was not explicitly pursued in the appellate judgments.

The other majority judge, Cleary J. (with whom North J. expressed general agreement) based his judgment on intent to pass property. He reviewed the authorities on mistake of identity and said that the argument in the instant case was that, as in those cases, property did not pass because mistake as to identity prevented a consensus between the parties to the transaction. He went on to say that this argument did not possess "the attraction of inviting ready application to the facts of the present case." [11] Speaking of the cases cited he said:

> "There are, no doubt, good reasons why a vendor, believing he is giving credit to some well-known person, should be protected from losing his property by being deceived into making delivery to an impostor. There is no reason why a purchaser, believing there is a valid sale to him of goods delivered to him and for which he pays cash, should be precluded from obtaining title from one who is in truth and in fact the owner of the goods, merely because that owner is successful in a deception that he was someone else. It would seem strange if a principle, evolved in cases where an unpaid vendor has been held not to have parted with the property in his goods unintentionally, should be applied to a wholly different situation so as to prevent a purchaser from acquiring title to goods for which he has paid and which the owner intended to sell him. I do not think the reasoning or the principle of the cases relied on by the appellant obliges us to reach any such result." [12]

Elsewhere in his judgment [13] he says that he is not aware of any case which has discussed the question whether mistake as to the identity of a vendor will prevent property passing to a purchaser. He considers that his view is supported by a passage in *Pollock and Wright on Possession* [14] and that *Boulton* v. *Jones* [15] and *Greer* v. *Downs Supply* [16] did not really cover the point because it was not properly raised in them and they could be distinguished by reason of the presence of set-offs.

[9] 23 Can.Bar Rev. 380–396. [10] 57 L.Q.R. 228.
[11] [1960] N.Z.L.R. at p. 430.
[12] This elaborates more fully a point made by Hardie Boys J. at first instance [1959] N.Z.L.R. at p. 956.
[13] [1960] N.Z.L.R. at p. 431.
[14] p. 108.
[15] (1857) 2 H. & N. 564.
[16] [1927] 2 K.B. 28.

Thus, his conclusion with regard to the authorities is that they all really turn on the true intention of the vendor as to passing of property of which mistake may form "cogent if not conclusive evidence," and that such mistake as there might be in the instant case did not vitiate this intent.[17] He treated Star Car Sales' ignorance of Mrs. Fawcett in the same way as North J. had done.[18] On this he said:

> "Save that she appeared on the certificate of registration as the owner of the car the name of Mrs. Fawcett or her personality meant nothing to him [a Mr. Gould, manager for Star Car Sales who dealt with Mrs. Fawcett]; she was not to him the equivalent of some well-known firm to whom credit might be given, as was the firm of Blenkiron & Co. in *Cundy* v. *Lindsay* [19] or Gandell & Co. in *Hardman* v. *Booth*.[20] Mr. Gould believed that the woman before him was Mrs. Fawcett (which she was not) and was the owner of the car (which for present purposes she was). He was in fact dealing with a person able to make title to the car. In my view, there was not merely one side to a contract but a contract in fact, voidable it is true, but one under which the property passed from the owner to the purchaser notwithstanding the false name assumed by the owner."

Cleary J. concluded his judgment with an examination of the agency aspects of the transaction between Mrs. Davies and Star Car Sales.[21] Here he made the interesting point that even if statements made by Mrs. Davies whilst carrying out her transaction with Star Car Sales might have had the effect, in consequence of the rule in *Humble* v. *Hunter*,[22] of preventing Saint-Mérat suing upon her contract as undisclosed principal had he so wished, nevertheless that was

[17] The learned judge's view that property can pass despite the fact that a contract is vitiated by mistake may be compared with the view taken by the Privy Council in *Singh* v. *Ali* [1960] A.C. 167 that property can pass despite the fact that a contract is affected with illegality. It may also be recalled that a somewhat similar problem has arisen in connection with the controversy as to whether property passes to an infant in pursuance of a contract rendered void by the Infants Relief Act 1874. See *Cheshire and Fifoot on Contract* 5th ed., at p. 343; *Anson on Contract*, 21st ed., at p. 174.

[18] [1960] N.Z.L.R. at p. 431.

[19] (1878) 3 App.Cas. 459.

[20] (1863) 1 H. & C. 803. It may perhaps be here remarked that the point made by North & Cleary JJ. that the name "Mrs. Fawcett" meant nothing to Star Car Sales was met very fairly by Gresson P. in his dissenting judgment at p. 420 when he pointed out that the significance of the name was that it appeared in the relevant documents as that of an eighteen month owner of the car, and Star Car Sales would not have been prepared to do business with a one-day owner of the car. Hence it might be argued that Star Car Sales had independent knowledge from the documents of Mrs. Fawcett's existence at the time of the deception practised on them and it then becomes clearer why the case can be classified as a "confusion of identities rather" than a "mistake of attributes" situation. Dr. Glanville Williams does appear to allow for independent knowledge gained contemporaneously with the deception: 23 Can. Bar Rev. p. 285.

[21] [1960] N.Z.L.R. at p. 432.

[22] (1848) 12 Q.B. 310.

" immaterial to the quite different question whether the property in the car passed."

Thus the majority judgments seem productive of the following propositions. First, that third parties may raise questions of contractual mistake affecting contracts to which they are not a party. The silence of North and Cleary JJ. on this point, coupled with their care to base their judgments on grounds other than that on which Hardie Boys J. chiefly chose to rest his opinion, seems not incapable of being construed as implicit disapproval of that ground. Secondly, that a mistake of identity must be material. Since Mrs. Davies could give title, therefore they appeared to think that any other problems of identity could be set aside. Thirdly, that for mistake of identity to be operative the mistaken party must have prior knowledge of the existence of the person with whom he supposes he is contracting. Fourthly, that different considerations govern mistake of identity on the part of a vendor of chattels from those which apply to the case of a purchaser. Fifthly, in considering questions relative to the passing of property in goods, contractual intent is subordinate to intent to pass property which may pass despite defects of contractual intent. Sixthly, an agent acting for an undisclosed principal may be able to pass property on behalf of his principal even though the principal might be debarred from suing upon the transaction entered into by his agent.

In a powerful and elaborate dissenting judgment Gresson P. in the first place explicitly disapproved the proposition advanced by Hardie Boys J. that it was not open to third parties to raise questions of contractual mistake.[23] The learned President then proceeded to review the English authorities on mistake of identity and came to the conclusion that there had indeed been operative mistake in the present case.[24] A point of exceptional interest made in his survey of the cases involves *Phillips* v. *Brooks*.[25] It will be recalled that in *Dennant* v. *Skinner*,[26] Hallett J. said that as far as he knew *Phillips* v. *Brooks* had never been judicially disapproved and Hardie Boys J. placed some reliance on this remark in giving his judgment.[27] On this Gresson P. said [28] that though Hallett J.'s remark was true in the sense that *Phillips* v. *Brooks* had never been judicially directly questioned, it failed to have regard to the fact that the case was in conflict with consensus of judicial opinion and especially with *Lake* v. *Simmons*.[29] In discussing this last case Gresson P. did

[23] [1960] N.Z.L.R. at p. 411.
[24] *Ibid.* at p. 425. At p. 412 Gresson P. says that he does not think that a party to a contract void for mistake can affirm it. In this he differs from Hardie Boys J. and from Dr. Glanville Williams: 23 Can.Bar Rev. 396–7.
[25] [1919] 2 K.B. 243.
[26] [1948] 2 K.B. 164.
[27] [1959] N.Z.L.R. 956.
[28] [1960] N.Z.L.R. at p. 414.
[29] [1927] A.C. 487. In 23 M.L.R. at p. 110, n.11, attention was drawn to Dr. Glanville Williams' opinion in 23 Can.Bar Rev. 276, n.11, that Viscount Haldane, by explaining *Phillips* v. *Brooks* in *Lake* v. *Simmons* on a ground other than that expressly adopted by Horridge J., implicitly disapproved that express ground. See also [1960] N.Z.L.R. at p. 416.

remark that the situation before the New Zealand Court of Appeal was the converse of that which had faced the House of Lords but he thought that the principle was applicable nonetheless. He thus rejected the view taken by his fellow judges that different considerations apply to the case of the mistaken purchaser from those which apply when the seller is mistaken. The President adopted the orthodox view of mistake of identity involving a confusion of two personalities, citing in this connection Dr. Goodhart's article,[30] and later in his judgment [31] he said that he did not feel called upon to explore problems of the relationship of law and equity in contractual mistake raised by *Solle* v. *Butcher*,[32] but he remarked that a substitution of contract voidability for contract nullity in the present case would in his view merely result in the substitution of injustice to the plaintiff for injustice to the defendant.[33]

He thought that in addition to the well-known unilateral mistake as to identity another type of mistake—mistake as to the possibility of performance—might be relied upon to resolve the problem before the court.[33] He cited in this connection *The Salvador* [34] where a tug had proved incapable of performing a task for which it had been hired and the contract was treated as a nullity by Bigham J.

Even if he were wrong in his views on contractual mistake, however, Gresson P. said that he was prepared to hold that there was no contract with Star Car Sales on the basis of rules of agency. In the first place the learned President thought that even if it be accepted that Mrs. Davies was Saint-Mérat's agent she was not a general agent but a particular agent to sell the car in a special way.[35]

> "She had no authority to sell the car as agent of or on behalf of Saint-Mérat. The authority she received was to perpetrate a swindle by posing as Mrs. Fawcett; it was not to sell Saint-Mérat's car as his car. *Miles* v. *McIlwraith* [36] decides that, where there is a general agent of an undisclosed principal with a special restriction or limitation of his authority, one who contracts with him as principal can only resort to the real principal subject to the limitation which has been placed upon the agent's authority, because he has not been dealt with as agent nor has there been any holding out or crediting of him as such or any contract on the faith of the authority."

The President then went on to say that even if one attributed to Mrs. Davies the character of general agent with authority to sell the car on Saint-Mérat's behalf she did not do so. She sold it as her own car, insisting that she was the owner. Such insistence, in the opinion of the President, brought the rule in *Humble* v.

[30] [1960] N.Z.L.R. at p. 415.
[31] *Ibid.* at p. 411-417.
[32] [1950] 1 K.B. 671.
[33] [1960] N.Z.L.R. at p. 417.
[34] (1909) 26 T.L.R. 149.
[35] [1960] N.Z.L.R. at p. 420.
[36] (1883) 3 App.Cas. 120.

Hunter[37] into operation and hence nullified the agency. He cited academic and judicial comment on the rule and, though recognising that it had been subjected to some criticism, thought that it was still good law. He declined to explore the controversy as to whether the rule was one of evidence or based on an implied term in the contract, but thought it might well stand upon both grounds. He then proceeded to demonstrate the resemblance between the instant case and *Said* v. *Butt*[38] and thought that just as the deception in that latter case had vitiated the contract with the theatre, so here the deception practised by Mrs. Davies should have the like effect. On this it may perhaps, with respect, be regretted that he did not call attention to the fact that *Said* v. *Butt* has been the subject of even more doubt and dispute than *Humble* v. *Hunter*.

He concluded his judgment[39] by vigorously controverting the view which proved acceptable to his brethren that mere delivery of the car could pass the property in it independently of the validity of the contract. He found it difficult to understand this contention because he was of the opinion that delivery of the chattel, except in certain special cases of which this was not one, could not pass ownership. He said:

> "No mere delivery of a chattel, unless it is by way of gift, or by an executor or administrator in performance of his duties, or as pursuant to a contract of sale, will carry the property in the chattel."

He thought that "the somewhat obscure" passage in Pollock and Wright, *Possession in the Common Law*, which had been cited for the contrary proposition, was not satisfactory authority, especially as the one case which seemed to be cited in support of it, *Boulton* v. *Jones*, appeared to him to be authority to the contrary effect. He continued:

> "In a sale of goods the essential thing about which the parties are contracting is the property in the chattel which is the subject of the transaction. But it is equally essential that the sale be supported by a valid contract. The passing of property is not something quite independent of the contract; the property passes only if there is a contract pursuant to which the property passes. There may or may not be delivery at that time."[40]

In conclusion it may be said that it is obvious that within the necessary limits of the present comment it has been impossible to do full justice to all the many points raised in the judgments in this remarkable case. Whatever points of controversy remain open there will, however, be general agreement that the New Zealand

[37] (1848) 12 Q.B. 310.
[38] [1920] 3 K.B. 497. See [1960] N.Z.L.R. at p. 423.
[39] [1960] N.Z.L.R. at pp. 423–4.
[40] See *ante*, note 17, on passing of property.

Court of Appeal has made a most significant addition to the judicial exploration of most obscure and complex, but nevertheless important fields of law.

A. H. Hudson.

Nonsense and Nonfeasance—Reaction and Reform

Highway authorities are not liable to any persons who suffer damage as a result of the authorities' failure to perform their duty of keeping the highway in repair. A highway authority is liable for misfeasance but not for nonfeasance. This is well known and well disliked law—vilified not only by academic writers and the general public, but also by many judges [1]—yet instances of its unfair application march steadily through the law reports. The doctrine was created and reared by the common law and has recently received statutory recognition in the Highways Act, 1959, s. 298.

The latest application of the principle is in *Burton* v. *West Suffolk County Council.*[2] There the defendants, as highway authority, carried out some drainage work on a road which was frequently flooded by heavy rain. This drainage work was properly carried out and, indeed, effected some improvement to the road. However, the work was inadequate and the road was still liable to flood after heavy rain. One December evening the plaintiff, driving his car along this road, skidded on a patch of ice, crashed and was injured. The trial judge stated: ". . . in my view the strong probability is that, if the road had been properly drained at the time, there would have been no ice at this point where the accident occurred when the plaintiff passed." The Court of Appeal upheld Salmon J.'s decision that the defendants were not liable to the plaintiff. The properly carried out, yet inadequate, drainage work done by the defendants was not misfeasance; failure to do further work to drain the road properly was nonfeasance for which there is no liability. "I am quite unable to accept the argument that this is a misfeasance on the part of the highway authority. By drainage works in themselves proper, the authority decreased the danger on the road, but they had not made it a completely safe road in times of heavy rain. They had done nothing improper, and have brought no dangers to users of the road which were not there before." [3]

[1] A recent judicial cry against this doctrine is by Salmon J. in *Att.-Gen.* v. *St. Ives R.D.C.* [1959] 3 W.L.R. 575, 581: "This rule has long been established in our law, and no doubt has the soundest historical justification. It is, however, an archaic and anomalous survival into modern times. It would be difficult indeed to think of any sound reason why today highway authorities should enjoy this immunity. Nevertheless, there can be no doubt that in law they do enjoy the immunity, and I must apply the law; but I am not obliged to extend it." This decision is under appeal.

[2] [1960] 2 W.L.R. 745; [1960] 2 All E.R. 26 (C.A.).

[3] [1960] 2 W.L.R. 752-753, *per* Upjohn L.J.

This, admittedly, seems a logical argument. Yet the contrary argument presented, and left open, by Lush J. in *McClelland* v. *Manchester Corporation*[4] and *Moul* v. *Thomas Tilling*[5] is also logical and it is fairer. In support of the reasoning in the present case one may cite the harsh House of Lords decision in *East Suffolk Rivers Catchment Board* v. *Kent*.[6] However, there and in many other cases where an authority has been held not liable for not completing a task undertaken, the tasks have been undertaken in pursuance of a statutory power. Highway authorities are under a statutory duty to maintain the highway.[7] Since many judges have expressed their dislike for the nonfeasance rule, surely it is perfectly easy and proper to argue that although there is no civil liability for non-exercise of a statutory duty to maintain the highway, once the duty is undertaken, then it must be carried out not only properly but adequately. The Court of Appeal refused to follow this argument and thus widened the nonfeasance immunity. The court referred to and approved of the decision of Morris J. in *Wilson* v. *Kingston-upon-Thames Corporation*,[8] where the highway authority was not liable when a hole in the road was temporarily repaired by tar-macadam and subsequently became dangerous. Strangely enough, no reference was made to the fact that this decision was affirmed by the Court of Appeal[9] and, therefore, was binding on the present court. It would have been more in keeping with judicial feelings to have followed reluctantly a binding authority (assuming that it could not be distinguished) rather than to imply, as did the Court of Appeal here, that it was free to choose and yet still make a reactionary decision.

Now that the extension of the nonfeasance immunity has been confirmed the position is:

(a) a highway authority is not civilly liable for failure to exercise its statutory duty to maintain the highway (nonfeasance proper);

(b) if the highway authority carries out its duty, but does so negligently, there is liability for injury (misfeasance proper);

(c) if the highway authority, in exercise of its duty, performs certain work properly, yet such work is inadequate and there is injury, the highway authority is not liable, since the injury would still have occurred had no work been carried out—see (a) (nonfeasance plus).

[4] [1912] 1 K.B. 118 at p. 127.
[5] (1918) 88 L.J.K.B. 505 at p. 509.
[6] [1941] A.C. 74. See also the street lighting cases discussed in *Fisher* v. *Ruislip-Northwood U.D.C.* [1945] K.B. 584 (C.A.).
[7] See now s. 44 (1) of the Highways Act, 1959.
[8] [1948] 2 All E.R. 780.
[9] [1949] 1 All E.R. 679. There is no mention of the Court of Appeal decision in the *All England Report* of the present case, and it is only referred to in a footnote reference in the *Weekly Law Reports*.

Perhaps it is just as well that this extension of nonfeasance immunity has been emphasised now, since it may spur on the efforts of the ever-increasing numbers crying for reform. In February 1960 the General Council of the Bar published a carefully presented Report on the defence of nonfeasance and recommended its abolition. The usual reasons for its abolition were presented: the rule is anomalous; it often leads to grave injustice; and it is the one case in which highway authorities alone escape liability for breaches of their own statutory duty. Countering the arguments of those who fear a flood of actions at the public expense, the Bar Council accept that "the standard of inspection and of repair upon the highway might require improvement to escape the high liability" and then point out that this "can hardly be deplored where road safety is of primary significance."

It is paradoxical that just at the time when the cry for reform is at its fiercest, and indeed twenty years after the Alness Committee on Road Accidents had recommended abolition, the Highways Act, 1959, should, for the first time, give statutory recognition to the anomalous principle. The reason for this was that the Highways Act was designed largely as a consolidation of the existing law, and it was not convenient to amend the law in such an Act.[10] Further, there was no time in that Session to make a change, but early reform was foreshadowed.[11] On March 17, 1960, the Attorney-General stated, in reply to a question in the House of Commons, that the Law Reform Committee had not been invited to consider this problem since the whole question was the subject of discussion between the Minister of Transport and Civil Aviation and the highway authorities' association. On June 3, 1960, the Highways (Public Authorities' Liability) Bill [12] was read for the first time. The Bill simply provided for the abolition of the defence of non-feasance, and consequently the repeal of section 298 of the Highways Act, 1959. Highway authorities were to be liable under general principles for failure to take reasonable care, whether by commission or omission. Clause 2 provided that any extra financial burden incurred as a result of this reform "shall be paid out of moneys provided by Parliament."

The second reading of this simple Bill was arranged for June 24, 1960, but other matters kept it out. This embryo expired at the end of the session. Is it too much to hope that a new Bill will be reintroduced and passed early next session? Surely the Government can find time to translate this measure into the law.

Gerald Dworkin.

[10] s. 89 of the Highways Act, 1959, does modify the position slightly. The highway authority is required to maintain any cattle-grid or other works related thereto, and expressly excludes the defence of nonfeasance in such circumstances.

[11] See *Hansard*, 1958–59, Vol. 603, col. 1237–1239.

[12] A Private Member's Bill introduced by Mr. McLaren (Labour) and supported by Mr. J. Hobson (Labour), Messrs. Corfield, Fletcher-Cooke and Gardner and Mrs. M. Thatcher (Conservative).

Deductions Under Section 2 (1) of the Law Reform (Personal Injuries) Act, 1948.

The Court of Appeal has now given its opinion on the problem that has vexed Finnemore,[1] Paull,[2] Stable,[3] Edmund Davies[4] and Ashworth[5] JJ.[6] Their problem was this—when a court is assessing damages for personal injuries the Law Reform (Personal Injuries) Act, 1948, s. 2 (1), requires that it should take into account against any damages awarded to the injured person for loss of earnings "one-half of the value of any rights which have accrued or probably will accrue to him . . . in respect of industrial disablement benefit . . . for the next five years beginning with the time when the cause of action accrued." Two kinds of benefit are provided by the National Insurance Industrial Injuries Act, 1946. If the injury is assessed as a disablement of 20 per cent. or more then the injured person receives a weekly payment for the period of disability. If the disablement is assessed at less than 20 per cent. then the injured person receives a disablement gratuity of a lump sum.[7] The application of the Personal Injuries Act, 1948, s. 2 (1), to disablement gratuities raises two possibilities. The court could simply deduct one-half of the whole of the disablement gratuity because the right to the gratuity has accrued within the five years—this was done by Finnemore and Paull JJ.[8] Or the court could deduct one-half of such proportion of the disablement gratuity as equals the proportion of five years to the life expectancy of the injured person (or that period for which disability is expected to last)[9]—this was approved by Stable, Edmund Davies and Ashworth JJ.[10]

The Court of Appeal in *Hultquist* v. *Universal Pattern and Precision Engineering Co., Ltd.*[11] (Sellers, Ormerod and Upjohn JJ.) decided that the second possibility was the correct one. However, Sellers L.J. pointed out that the first instance judges would have found their task easier had they referred to section 2 (6) (*c*) of the Personal Injuries Act, 1948, where the draftsman had in

1 *Watkins* v. *C. A. Parsons & Co., Ltd.* (Jan. 15, 1958) unreported and *Hultquist* v. *Universal Pattern and Precision Engineering Co., Ltd.* (Mar. 16, 1959) unreported.
2 *Roberts* v. *Naylor Bros., Ltd.* [1959] 1 W.L.R. 718; [1959] 2 All E.R. 409.
3 *Meagher* v. *Parnall (Yate) Ltd.* (Mar. 3, 1958) unreported.
4 *Perez* v. *C.A.V. Ltd.* [1959] 1 W.L.R. 724; [1959] 2 All E.R. 414.
5 *De Ridder* v. *Ford Motor Co., Ltd.* (Oct. 3, 1958) unreported.
6 See 22 M.L.R. 687 for a previous case note on *Perez* v. *C.A.V.* and *Roberts* v. *Naylor*.
7 National Insurance Industrial Injuries Act, 1946, s. 12 (6) and (7).
8 In *Watkins* v. *C. A. Parsons*, *Hultquist* v. *Universal Pattern and Precision Engineering* and *Roberts* v. *Naylor*, *supra*.
9 National Insurance Injuries Act, 1946, s. 12 (4). "The period to be taken into account by the assessment of a claimant's disablement shall be the period . . . during which the claimant has suffered and may be expected to continue to suffer from the relevant loss of faculty . . ."
10 *Meagher* v. *Parnall*; *Perez* v. *C. A. V.* and *De Ridder* v. *Ford*, *supra*.
11 [1960] 2 W.L.R. 886; [1960] 2 All E.R. 266.

fact provided for this very contingency—" an industrial disablement gratuity shall be treated as benefit for the period to be taken into account by the assessment of the extent of the disablement in respect of which it is payable." [12]

The defendants suggested that in section 2 (1) of the Personal Injuries Act the " period taken into account " did not mean the period of disablement for which the gratuity was to provide compensation but a period of seven years, thus making the necessary deduction one-half of five-sevenths of the gratuity. They contended that the period should be seven years because regulations under the Industrial Injuries Act, 1946,[13] provide that if the period of disability is seven years or more then the full amount of gratuity, in accordance with the percentage of disability, should be paid, whereas if the period is less than seven years only a portion of the full amount is to be paid. So the full amount of the gratuity is compensation for seven years' disability. This was rejected by the Court of Appeal.[14] It is surely clear that the " period to be taken into account " means taken into account in the assessment of the disability and not the period taken into account in the calculation of the amount of the gratuity.[15]

The defendants also suggested that in section 2 (1) the " value of any rights which have accrued . . . " meant not the actual amount of the gratuity but the value of that amount, which might be higher than the actual gratuity for the recipient could use it to purchase an annuity. This found some favour with Upjohn L.J., who thought there was " much to be said for taking the view that one ought to treat this sum as representing a capital sum which must be treated as a pension for the life of the annuitant." [16] He did not, however, apply this suggestion as the statute made no provision for it and it was unlikely that the recipient would so use the money. Sellers L.J. was of the opinion " that common sense requires the argument to be rejected." [17] The suggestion is certainly startling. If the value of the gratuity is to be considered in terms other than its actual amount why should the court not also consider that the value of the annuity that the plaintiff is deemed to have purchased might fall below the amount of the gratuity due to inflation? It would also place an extra burden on the person whose injury is assessed below 20 per cent. because he has to purchase his own pension, whereas if he is assessed as disabled at 20 per cent. or over then this is all done for him by the state.

[12] *Hultquist* v. *Universal etc. Engineering* [1960] 2 All E.R. 266 at 269.
[13] National Insurance (Industrial Injuries) (Benefit) Regulations, 1948 (S.I. 1948, No. 1372), reg. 3.
[14] *Hultquist* v. *Universal etc. Engineering* [1960] 2 All E.R. 266 at 271, *per* Sellers L.J.
[15] In *Roberts* v. *Naylor* [1959] 1 W.L.R. 718, Paull J. at 721 rejected a similar argument based on the fact that the actual amount of the gratuity is based on the cost of seven years' purchase of a weekly sum.
[16] *Hultquist* v. *Universal etc., Engineering* [1960] 2 All E.R. 266 at 273.
[17] *Ibid.* 272.

Finally Upjohn L.J.[18] approved Ashworth J.'s decision in *De Ridder* v. *Ford* to make a rough estimate of the life expectancy of the injured person if there is no evidence before the court on this point.

Olga L. Aikin.

Plant and Machinery under the Factories Acts

The decision of Devlin J. (as he then was) in *Quintas* v. *National Smelting Co., Ltd.*[1] will be welcomed as an extension of the beneficent umbrella of the Factories Acts,[2] but in so doing the decision seems to have disturbed the logical arrangement of the principal safety requirements.

The plaintiff Quintas was a fitter employed at the defendants' Avonmouth works. He was thrown to the ground from the flat roof of the crushing plant, a distance of eighteen feet, and severely injured. His fall was caused by a blow from a large and heavy bucket, suspended from a ropeway which passed across the crushing plant roof, with a clearance of about four feet between the bottom of the bucket and the roof, at the site of the accident. These buckets travelled slowly along the ropeway at about 3 miles per hour, at intervals of 110 feet; it was not disputed that they were a possible cause of injury to workmen, either by knocking them down or, as in the plaintiff's case, by throwing them over the edge of the roof.

Quintas' duties on the roof were confined to the area of the "magnet house," which was not on or near to the line of the ropeway; and an attempt had been made to fence off the unsafe part of the roof, or at least to indicate that access to it was restricted. In any event the fence was incomplete and presented no real obstacle to entry by a determined person.

The plaintiff wished to communicate with his foreman, and to do so entered the restricted part of the roof and called down from the edge to the foreman's office. It was while his attention was occupied in this way that he was struck by the bucket.

His Lordship found[3] as a fact that the plaintiff knew it was dangerous to stand under the ropeway at this point, and held that the defendants were not in breach of any duty at common law; but he reserved judgment on the question whether the machinery provisions of the Acts applied to the ropeway. Finally he held that the ropeway was "machinery" within the meaning of the Acts, and that the bucket moving across the roof was a "dangerous part" which was not securely fenced for the prevention of accidents as

[18] *Ibid.* 272.

[1] [1960] 2 W.L.R. 217; [1960] 1 All E.R. 104.

[2] Factories Acts, 1937 (1 Edw. 8, 1 Geo. 6, c. 67); Factories Act, 1948 (11 & 12 Geo. 6, c. 55); Factories Act, 1959 (7 & 8 Eliz. 2, c. 67)—referred to in this note as 'the Acts.' All references to sections relate to the Act of 1937, only, unless otherwise stated.

[3] [1960] 2 W.L.R. at p. 220-221; [1960] 1 All E.R. at p. 106.

required by section 14 (1).[4] The point was a novel one, completely lacking in authority, and the decision was based on Lord Normand's view in *Parvin* v. *Mortin Machine Co., Ltd.*[5] that the Acts applied to "machinery for use in the factory in the processes of manufacture or as ancillaries to these processes." On this basis Mr. Justice Devlin argued that the transport of materials for use in the processes of manufacture was ancillary to these processes and concluded

> "that the whole of the ropeway must be regarded as one piece of apparatus and as machinery within the meaning of the Act. This does not, of course, mean that every part of it has to be fenced, but only those parts, such as the one I am considering in this case, where there is a danger to those underneath." [6]

Lord Normand had given no examples of what he had in mind as "ancillaries," and indeed Lord Reid contented himself, for the purposes of the same decision, with stating that the Acts applied to "machinery which is part of the equipment of a factory," [7] while Lord Asquith observed that "construed quite literally these words (any machinery) would no doubt include almost anything . . . ," [8] but came down in favour of "machinery used as a productive agent."

It is respectfully submitted that Lord Asquith's addendum is *obiter*, the point to be decided being whether the Acts applied to machinery being manufactured in the factory, or only to machinery forming part of the equipment of the factory.

The question, what is machinery for the purpose of the Acts, cannot receive a satisfactory answer. A careful consideration of the Acts, and the reported cases, sheds little light on the intentions of Parliament in this respect. Some distinction is drawn between "plant" and "machinery"; this is understandable, as the two present different industrial hazards, and require separate treatment regarding the precautions to be taken and the standards of care to be adopted. Neither term is defined in the Acts, so that the important dividing line between the two is left to the courts. Generally, "machinery" has been defined [9] as an "apparatus for applying mechanical power." In factories the "mechanical power" may be generated by human muscles,[10] but logic would demand that the "machine" has parts capable of motion in relation to one another, otherwise a hammer or similar hand tool would be included.

[4] There being no regulations covering the situation.
[5] [1952] A.C. 515 at p. 520; [1952] 1 All E.R. 620 at p. 670.
[6] [1960] 2 W.L.R. at p. 221–222; [1960] 1 All E.R. at p. 106.
[7] [1952] A.C. at p. 523; [1952] 1 All E.R. at p. 673.
[8] [1952] A.C. at p. 524; [1952] 1 All E.R. at p. 673.
[9] *Shorter Oxford English Dictionary*, 1933 ed.
[10] See *Kinder* v. *Camberwell Borough Council* [1944] 2 All E.R. 315. Regulation 139 of the Draft Works of Engineering Construction Regulations governs "dangerous machinery" "whether or not driven by mechanical power."

"Plant" used alone connotes[9] "fixtures, implements, machinery and apparatus used in carrying on any industrial process," and would presumably include works transport; but when both terms were used together Kekewich J.[11] thought that "machinery" included everything which by its action produced or assisted in production, and "plant" was that without which production could not go on, *i.e.*, dead stock.

The two terms appear frequently in the Acts, and while on occasion "machinery" is obviously used with precision,[12] there is no example where "plant" is similarly used; in conjunction they appear to refer to all apparatus in a factory.[13]

There is, however, a distinct "plant" safety obligation discernible in the Acts, relating to "structural safety," and imposed by the use of some selection from the phrases "good mechanical construction, sound material, adequate strength, free from patent defect, and properly maintained."[14] This obligation is not imposed generally, but applied only to particular classes of "plant,"[15] and is clearly intended to protect workpeople against the risks of structural failure.

Several provisions[16] apply to "plant" which may present dangers while remaining structurally safe, and generally require the fencing off of the hazard. The peculiar dangers resulting from the lateral movement of overhead cranes is met by section 24.[7]

"Machinery," on the other hand, is dealt with generally in sections 12–17 and 19–21. A reading of these sections suggests that they are intended to protect workpeople from dangerous moving parts of "machinery" by means of fencing. The danger appears to be danger of injury from the normal working of the "machine," and not from structural failure of any part of it,[17] as in the "plant" sections.[15] As Lord Porter puts it in *Carroll* v. *Barclay* (*Andrew*) *& Sons Ltd.*[18]: "Throughout the relevant sections I can find no hint that the danger of machinery breaking has been taken into account. The words 'of such construction' in sections 12 (3), 13 (1), and 14 (1) deal with types of construction, not with the strength of the machines."

It thus appears necessary to draw a fine distinction between "machinery" and "plant" to discover the factory occupiers' liability in marginal cases.

[11] In *Re Nutley I. Finn* [1894] W.N. 64.
[12] *e.g.*, in ss. 12–17.
[13] *e.g.*, in s. 65.
[14] These requirements are absolute in character: see *Galashiels Gas, Co., Ltd.* v. *O'Donnell* (or *Millar*) [1949] A.C. 275.
[15] *e.g.*, hoists and lifts, s. 22; chains etc., s. 23; cranes s. 24; floors etc., s. 25; boilers, s. 29; air receivers, s. 31; gas holders, s. 33.
[16] *e.g.*, moving parts of hoists: s. 22 (3-5), (7), (10); stairs and openings: s. 25 (2–3).
[17] No doubt Regulations made under s. 60 could lay down standards of "structural safety" for machinery, but have not done so.
[18] [1948] A.C. 477 at p. 484; [1948] 2 All E.R. 386 at p. 389.

"Dangerous machinery" under the nineteenth-century safety legislation was taken to mean[19] unsafe gears, belts and shafts, as these caused most accidents.

Now there is no doubt that "dangerous parts" in section 14 (1) include the tools of the different types of machine tools used in factories, but there is still doubt as to how far beyond machine tools, and similar productive machines, the requirements of the section extend. *Fowler* v. *Yorkshire Electric Power Co., Ltd.*,[20] is the only case discovered in which machinery has not been given the conventional restricted meaning before *Quintas*. In this case Lawrence J. held that a 100-ton overhead crane was a "dangerous part of machinery" within section 10 (1) (*c*) of the Factory and Workshop Act, 1901[21]; but it is significant that this particular danger has now been dealt with in section 24 (7), one of the "plant" requirements of the Acts. It is arguable whether *Fowler* would still be followed, now that this particular danger is otherwise dealt with.

This argument may not be conclusive. The House of Lords recently[22] considered it while construing the Coal Mines Act, 1911.[23] Lord Keith saw "no reason why protective provisions may not overlap"[24]; Lord Somerville, while conceding that "one may find in a statute a section plainly intended by its wording to deal with all cases of X, although, if it had not been there, some cases of X would have arisen and been differently dealt with under another section," considered that he could not construe the Coal Mines Act in this way.[25]

Therefore too much cannot be made of the fact that the "transport" type of risk, undoubtedly the real risk in *Quintas*, is dealt with in codes of factory Regulations.[26] The dangers of overhead ropeways on building sites are moderated by Regulation 36 of the Building Regulations.[27] Similarly the Locomotives and Wagons Regulations[28] minimise the risks to employees from factory railways. These Regulations apply to rope-hauled wagons, which are not unlike overhead ropeways.

Mr. Justice Devlin, in considering whether transport could come under the control of section 14 (1), (4), restricted himself[29] to situations where the offending vehicle could be regarded as the "dangerous part" of some greater whole. He left the status of

[19] *e.g.*, in *Hamilton* v. *Groesbeck et al.* 19 O.R. 76, per Armour C.J. at p. 80.
[20] [1939] 1 All E.R. 407.
[21] 1 Edw. 7, c. 22.
[22] In *Grant* v. *National Coal Board* [1956] A.C. 649; [1956] 1 All E.R. 682.
[23] 1 & 2 Geo. 5, c. 50.
[24] [1956] A.C. at p. 667; [1956] 1 All E.R. at p. 691.
[25] [1956] A.C. at p. 669; [1956] 1 All E.R. at p. 692.
[26] Made under ss. 46 and 60.
[27] The Building (Safety, Health and Welfare) Regulations, 1948, No. 1145.
[28] Locomotives and Wagons on Lines and Sidings Regulations 1901, No. 679.
[29] [1960] 2 W.L.R. at p. 221; [1960] 1 All E.R. at p. 106.

lines of trucks running on rails in some doubt. Although, for the sake of argument, they were excluded in the judgment, this was done in terms [30] which still appear to leave it open to a plaintiff to argue that one truck in a line was a "dangerous part" of a "machine"; and as suggested above, the existence of the Locomotives Regulations [28] would not be a conclusive answer.

It may be observed that, while the overhead ropeway is now a "machine" for the purpose of the Acts, it may also be "plant" for the same purpose, as it appears to fall within the definition of "lifting machine" in section 24 (8). If this is correct it will afford almost the sole example [31] of equipment protected under both the fencing and the structural safety requirements of the Acts.

While it is desirable that the known risks from ropeways be regulated by the Acts, and suitable provision could easily be made by means of Regulations,[26] it is submitted that the best way to avoid the difficulties of this type of case would be to put a comprehensive definition of "plant and machinery" in the Acts, making a clear line of distinction between them, and thus safeguarding what Lord Asquith [32] called the "architecture" of the Acts against the distorting effects of future borderline decisions.

A further point of interest raised by the *Quintas* decision concerns the type of injury section 14 (1) is intended to prevent.[4] An action based on breaches of statutory duty can be brought by a plaintiff who can show, *inter alia*, that his injury was the one against which the particular section contravened was intended to afford protection. This principle, stated in *Gorris* v. *Scott*,[33] has not been applied with undue stringency to actions based on industrial safety legislation.[34] Nevertheless, it could be argued that each provision, even in a safety statute, was aimed at some particular type of injury, and it was assumed that only for this particular injury would an action lie.

In *Grant* v. *National Coal Board* [22] the House of Lords considered this "difficult and interesting question," [35] and held, reversing a unanimous decision of the Second Division of the Court of Session, that the object of the Coal Mines Act, 1911,[23] was to provide safety in its many forms, and that the Board were liable to a workman who had been injured in a most indirect manner by the fall of a stone from the roof of a travelling road in a mine. Their Lordships were urged to follow *Gorris* v. *Scott*,[32] but were unwilling to apply it to industrial safety legislation. *Per* Lord Reid: "I do not doubt this case was properly decided. . . . But it seems to me to be

[30] *Ibid.*
[31] Perhaps the overhead crane in *Fowler*; see note 20, *supra*.
[32] In *Parvin* (note 5, *supra*), at p. 524.
[33] 1874 L.R. 9 Exch. 125.
[34] *e.g.*, *Holmes* v. *Hadfields Ltd.* [1944] 1 All E.R. 235 (C.A.); *Gatehouse* v. *Summers J. & Sons Ltd.* [1953] 2 All E.R. 117 (C.A.).
[35] Note in 72 L.Q.R. 305.

a very different thing to say, that where the object of the enactment is to provide safety, the implication is that liability only arises if the breach causes injury in a particular way." [36]

This decision suggests that for the future *Gorris* v. *Scott* [32] will have little bearing on safety legislation, and *Quintas* seems to bear it out. Although this may be the first reported decision involving "machinery" causing a serious fall, the defence apparently did not maintain that the injury was not within the "mischief" of section 14 (1),[4] nor was the point raised in the judgment.

R. W. L. Howells.

[36] [1956] A.C. at p. 660; [1956] 1 All E.R. at p. 687.

REVIEWS

LAW IN A CHANGING SOCIETY. By W. FRIEDMANN. [London: Stevens & Sons, Ltd. 1959. xxvi and 522 pp. £2 10s. net.]

IN 1951 Professor Friedmann published a widely welcomed book under the title *Law and Social Change in Contemporary Britain.* The present work is, in effect a radically revised and substantially enlarged new edition. The change of the title was necessitated by the broad comparative method which the author, drawing on his rich experience of the law of no less than five countries, has now to some extent adopted and which, notwithstanding its obvious and almost inevitable limitations, has led to a great increase of the work's scope in numerous respects. As Professor Friedmann emphasises, however, no change has occurred in his general attitude towards his subject, *viz.*, in "the conviction that the law must, especially in contemporary conditions of articulate lawmaking by legislators, courts and others, respond to social change if it is to fulfil its function as a paramount instrument of social order" (p. ix).

The book is divided into six parts the most important of which is headed Social Change and Legal Institutions and deals in separate chapters with Property, Contract, Tort and Insurance, Criminal Law and Family Law. The next part, entitled Society and the Individual, has a chapter on Freedom of Trade and Policy (devoted, mainly, to restrictive practices), another on Corporate Power, the Law and the State, and a third on Individual Freedom, Group Control and State Security (primarily contemplating Trade Union law). There follow three chapters on various aspects of administrative law and, finally, two chapters on international law. In addition, an introductory part discusses the theory of legal change, while a concluding part has as its theme the interrelation between the rule of law, the individual and the Welfare State. Though, unhappily, a number of important topics, such as equity, company and tax law and, consequently, such jurisprudentially fascinating decisions as *Scottish Co-operative Wholesale Society* v. *Meyer* [1958] 3 All E.R. 66, have been ignored, the book gives a bird's-eye view of most of the pressing legal problems of the modern world. The reader will come across many shrewd, interesting and even illuminating remarks. He will, furthermore, derive much benefit from Professor Friedmann's refreshingly independent judgments and gratefully acknowledge the stimulating character of the discussion, and he will admire the confidence and also the learning with which the author discusses such diverse subjects as the M'Naghten Rules and the European Coal and Steel Community, the principle of the indissolubility of marriage and governmental liability for tort, birth control and legal controls over trade union discipline. The book must stand or fall, however, with its principal thesis and, although one would like to take up very many of the points made in this unusually thoughtful work, the real question is whether and to what extent the author has succeeded in establishing his thesis.

If one takes the sentence quoted above as Professor Friedmann's *leitmotif* the reader who likes to stand on firm ground will probably expect to be told three things: How do I recognise a "social change" (as opposed, for instance, to a political change or to social fluctuations or fashions of a purely temporary character)? Who, among "legislators, courts and others," is actually under a duty to respond to the change, once it is accepted as such? And, perhaps most significantly, how is such response to be effected by "courts and others"? It can hardly be asserted that, in so far as judicial practice is concerned, the answers are much clarified by the following statement which would perhaps have been capable of further precision (p. 33) and also seems to ignore the fact that there are many cases on record in which courts (particularly the

Supreme Court of the United States and the German Federal Tribunal) have anticipated or created or moulded public opinion:

> In his application of precedent, as in the interpretation of statutes, the judge must take note of major shifts in public opinion and social policy, of developments sufficiently fundamental to be accepted by the consensus of public opinion and to be expressed by the general trend of legislative policy. The theoretical formulation of such an approach must always remain somewhat vague, for the ways in which changes in public opinion express themselves in a democratic society are many, and it is not an easy task for a court to fix the borderline between accepted evolutions in public opinion, on the one hand, and personal philosophy or prejudice, on the other.

Nevertheless Professor Friedmann thinks that it is "not difficult to illustrate by concrete examples the distinction between personal idiosyncrasy and the incorporation of new social policies in the administration of the law." The first of these examples is this (p. 33):

> Any court of a contemporary industrialised country must . . . recognise collective bargaining and labour organisation as a legitimate and commonly accepted instrument of social action.

The duty so imposed upon "any court" presumably does not exist in the face of legislation in the opposite sense or where there are rules of law making particular aspects of labour organisation illegal. It may be that the learned author's attempt at an answer to the general problem occurs some thirteen pages later, when he says (p. 45) that "ultimately the proper balance between the conflicting values of stability and change can only be struck by judicial tact rather than abstract principle." Yet he recognises the insufficiency of this answer, for he appreciates that "we are still left with the question what principles are to guide the umpire in the agonising choice between values" (p. 46). It would seem that the only conclusion which Professor Friedmann provides is one which was formulated by Learned Hand and according to which judges should look for "the resultant of many confiicting strains that have come, at least provisionally, to a consensus" (p. 48).

One thus turns to the chapters dealing with various branches of the law and hopes that they give clear guidance on the undeniably important problems which Professor Friedmann has formulated. Since it is impossible to analyse each of these chapters, it is proposed to devote some attention to the chapter on Contracts—a chapter which, after study of the whole book, may fairly be described as representative.

The chapter opens with a discussion of the social function of contract in the "classical" era, which is indicated by the four headings of freedom of movement, insurance against calculated economic risks, freedom of will and equality between parties. As regards the first element it is suggested (p. 91) that it

> is increasingly overshadowed by a return to a new kind of immobility resulting from the profound changes produced by the social welfare responsibilities of the modern State, by group organisation and collective bargaining in industry and commerce, and, last but not least, the state of industrial mobilisation into which international strife has forced Western States since the outbreak of the First World War.

While the second element is said to be "comparatively free from difficulties of ideology or adaptation to social change" (p. 92), the foundations of the third "were shattered when corporations increasingly displaced physical persons as legal individuals, and as parties to commercial and industrial contracts" (p. 94). In connection with the problem of equality it is emphasised (p. 99) that "it would be idle to expect, even if it were desirable, that the courts could be the main instrument in adjusting law to new economic and social conditions."

The chapter then turns to a consideration of the main social causes of the transformation of contract, which produce some new phenomena: the standard contract; the collective contract between management and labour; numerous statutory terms of contracts and numerous contracts between public authorities and private parties; the doctrine of frustration. Under the heading of standardisation the author describes a situation which is, of course, in no sense unknown and was very recently defined in felicitous terms by Diplock J., when he delivered the judgment of the Court of Appeal in *Lowe* v. *Lombank Ltd.* [1960] 1 All E.R. 611, 613:

> The common law . . . subject to some restrictions based on public policy, permits persons to make whatever contractual bargains they please and will enforce those bargains. This general principle, of which the underlying assumptions are that persons entering into contracts are of equal bargaining power and read and understand what they sign, ignores the fact that under modern conditions many transactions, particularly of hire-purchase, are entered into by ignorant persons whose only choice is either not to enter into the transaction at all or to enter into it on the terms of a standard agreement, drafted by the hire-purchase company, and containing numerous clauses printed in miniscule characters which the hirers do not in fact read and, if they did, would be incapable of understanding.

Not even Professor Friedmann will be able to take exception to this statement, although according to him it is normally "easy enough to detect inarticulate premises or prejudices, or ignorance of economic and social realities, in English and American case law" (p. 95).

Departing from the order indicated by the above enumeration the learned author reverts, in the third place, to the doctrine of frustration. Apparently he regards it as an example of social change, because it was largely developed as a result of the economic upheavals which began with the First World War. His short analysis of the legal effects of the doctrine seems to imply some regret at the House of Lords' refusal to follow the Court of Appeal in asserting the judicial power of modifying contractual terms (pp. 113, 114). No lawyer who has experience of a legal system granting such power will feel inclined to share that regret. But this is a substantial problem of legal policy, which deserves penetrating treatment.

The chapter, admittedly containing only "a general picture of developments," ends with "some general conclusions" (p. 124). One of them is to the effect that "the increasing use of contract as an instrument of economic State policy, through the extension of governmental functions and the socialisation of industries, makes contract largely the legal expression of economic and social policies" (p. 125). All of them prove that the courts have somehow managed to cope with the new problems with which they were confronted. But the specific response to social changes (if these are understood to be different from new legal problems) is hardly depicted.

In the final analysis it cannot be regarded as certain to what extent Professor Friedmann has made a substantial contribution to the solution of the problem which he has posed. On the other hand there cannot be any doubt that he has succeeded in performing the perhaps equally important task of making his reader aware of the existence of that problem. Moreover, he has, perhaps somewhat unwittingly, achieved the result of emphasising the enormous difficulties which surround every aspect of the field surveyed in his book. What should be done by the unfortunate judge who desires to be not only judicial, but also progressive, who wishes to find the limits within which social changes may influence the development of the law, who aims at justice rather than conceptualist purity? How invidious and difficult his task is (and, notwithstanding Professor Friedmann, remains) may be shown by a single example. There is no doubt that, when in 1956 the majority of the Court of Appeal refused to enforce a gold clause in a domestic lease (*Treseder-Griffin* v. *Co-operative Insurance Co.* [1956] 2 Q.B. 127), it was motivated by what it

believed to be the demands of a progressive social or economic policy. Yet its efforts became subject to criticism and very recently Professor Gower described them as "an unhappy attempt to dabble in economics" (*Law and Opinion in England in the Twentieth Century* (1959), p. 172, note 22), a characterisation which, whether justified or not, is not without significance in the present context.

F. A. Mann.

Walter Bagehot: A Study of his Life and Thought, Together with a Selection from his Political Writings. By Norman St. John-Stevas. [London: Eyre & Spottiswoode. 1959. 485 pp. 36s. net.]

Dr. St. John-Stevas, having made an early reputation on the law of obscenity, formed a wish to revive the public interest in the work of that versatile and likeable Victorian, Walter Bagehot. An edition of Bagehot's writings in nine volumes was published by Mrs. Russell Barrington in 1915, but this was not definitive and is not always easily accessible, nor was the biographical volume satisfactory. Dr. St. John-Stevas was aware that Alastair Buchan was about to produce a new biography. (This has since been published under the title of *The Spare Chancellor*, with a useful chapter on Bagehot's political and constitutional ideas.) So his plan was to take the complete text of Bagehot's best-known work, *The English Constitution*—which readers may possess in the World's Classics Series, with an introduction by Lord Balfour—and to arrange round it a selection of Bagehot's principal essays on political subjects. The period before the publication of *The English Constitution* in the year of the second Reform Act is represented by essays on Lady Mary Wortley Montagu, Brougham and Peel, and the later period by essays on Gladstone and Disraeli, Parliamentary reform and membership, and an extract from *Physics and Politics* on government by discussion.

Bagehot may not have been a profound political theorist, but he had a remarkable insight into the actual working of social institutions and into the character of the persons who operated them. He was also gifted with an exceptionally lucid style and the ability to turn a memorable phrase. Into the first forty-five pages Dr. St. John-Stevas has compressed a vivid sketch of Bagehot's life, character and thought, and of his work as literary critic and economist. The remaining seventy pages of introduction contain an estimate of the correctness of Bagehot's political analysis at the time of the publication of *The English Constitution*, and a summary of the main constitutional changes of the last hundred years. Here the main topics are the monarchy and the relation of the Sovereign to Ministers and Parliament, the Houses of Lords and Commons, the Press, party system, Cabinet and civil service, and the constitution of the United States.

The whole introduction is well written and succinct. Bagehot's judgment of Queen Victoria's constitutional conduct is shown to need modification since the publication of the Queen's voluminous letters, though what he said about the House of Lords is even more apt since the Parliament Acts than it was before. In discussing the question of the remaining personal prerogatives, Dr. St. John-Stevas does not agree that the Sovereign can any longer refuse assent to Bills. He suggests that the Sovereign is not bound to create peers on the Ministers' advice, and that she may refuse to grant an honour recommended by the Prime Minister; but we are not sure about his suggestion that the Sovereign really has any say in the choice of individual Ministers (other than the Prime Minister), as distinct from the possibility in certain events of dismissing the Ministry as a whole. Dr. St. John-Stevas rightly points out that although George V encouraged the formation of a National Government in the 1931 crisis, the idea came from Opposition leaders whom in the circumstances he had the right to

consult. He shows why the prestige of members of Parliament has diminished since Bagehot's time, and that the main threat to the independence of members at the present day comes from the local party associations. One of the most important factors that Bagehot did not foresee, and which vitiates some of his prophecies, has been the rapid diffusion of education and wealth among the mass of the people. His hope that newly free states would adopt the Cabinet system rather than the Presidential system seems not to be going to be realised in the newly independent Asian and African countries of the Commonwealth.

Dr. St. John-Stevas half promises that if the present book is favourably received, he may follow it with further volumes of Bagehot's literary and economic works. We hope he will do this. Meanwhile, not only those who are specially interested in the English Constitution will welcome this lively background study and reappraisal of a Victorian classic. Some of the pithy sayings from *The English Constitution* are perhaps too well known, but this book enables us to extract from other writings such apothegms as "men never think if they can help it," and "all the best business is a little dull."

O. Hood Phillips.

The Scottish Legal System. By Professor David M. Walker, M.A., LL.B., PH.D. [Edinburgh: W. Green & Son, Ltd. 1959. xxvii, 298 and (index) 8 pp. 50s. net.]

The sub-title of this book is An introduction to the study of Scots Law, and in his preface Professor Walker emphasises that it is an introduction to the study of the system rather than an introduction to the law itself. This distinction accounts for the unexpected nature of some of the contents. Thus there is rather more of fairly elementary Scottish history, more short biographies of some notable jurists than one would normally have expected. To say that some material is unexpected is not to criticise it. The inclusion of such matter is reasonable and desirable, granted, for example, the general level of knowledge among students coming to law of such history. The same reason led also to the inclusion of a substantial amount of material on the "Study of Legal Science" and "The Divisions of Legal Science" and "Legal Method"—how and where to find your law—as well as the more usual material upon the sources of law. The whole is rounded off with a chapter on the Scottish Legal Tradition, a history of institutions and of the main events and people that influenced the law, one describing the modern judicial system, which includes England, Northern Ireland, and the Judicial Committee of the Privy Council, and finally a chapter on the elements of legal controversy, evidence, procedure, and proceedings in administrative tribunals.

Thus the book covers within a fairly short length much that is often divided over a variety of books. There is a great deal to be said for making that attempt, but the difficulties in doing so are obvious. On the whole those difficulties have been well surmounted. Some of the jurisprudential material may be found heavy going by the student: page 2 may be early to expose him to Llewellyn's definition of law. On the other hand some of the history—such as the description of feudalism on page 70—errs on the other side. Views on other portions are perhaps only personal prejudices about methods of teaching. Thus, while much that is said on legal material is very valuable, some parts, such as the description of the *Current Law* series, might have been left out. The written word cannot entirely replace the spoken word and demonstration, and there are parts of the book here which could be omitted and the purpose better achieved by an hour's conducted tour of a law library. Again, having regard to the users, the shape of some parts might be reconsidered. The statement in the text that English and Scots law are subject to "a common court of final appeal" is accurately modified in a footnote. One wonders however if students at this stage are avid readers

of footnotes. Equally one wonders, for somewhat similar reasons, whether the very useful bibliographies at the end of each chapter could not somehow be divided up. Some of the material they give is more fitted to advanced students and while some of them could no doubt profit from it even in their first year, for others, not so certain of their abilities or limitations, the material, if resorted to, might merely create unnecessary confusion. In later editions, too, some repetition might be removed, for example the passages on pages 117, 127 and 148 concerned with the Land Court might be consolidated, though admittedly a case can be made for some repetition in such a book.

Whatever criticisms are made they do not go to the heart of the matter. They are only made because one looks forward to a long life for the book, for without doubt it is a great step forward. Hitherto the Scottish law student has either had to do without the sort of material here given, and has suffered for it, or else he has had to use material not really suited as an introduction to his studies. A major gap has been filled, and filled successfully by Professor Walker. The achievement is however more than the somewhat passive one of filling a gap, for Professor Walker has produced a book which has an individual character, a result not easily attained in this field. That character will in itself help the student to an understanding of the individuality of his subject of study, which is a point which Professor Walker rightly, but without over-emphasis, makes throughout. The book should then make life easier both for students and for Professor Walker's colleagues by providing clear signposts to the former at a stage when they are most needed.

J. D. B. Mitchell.

The French Constitution of October 4th, 1958. By William Pickles, Senior Lecturer in Political Science in the University of London. [London: Stevens & Sons, Ltd. 1960. iii and 52 pp. 6s. 6d. net.]

This booklet is a reprint of an article published in the Autumn 1959 number of *Public Law*. Doubtless the reprinting has been undertaken to enable the article to be readily available to a larger number of people who may not subscribe to *Public Law*, and many readers will have cause to be thankful for the foresight of the publishers in this respect. The present reviewer read the article on its first appearance, but is nevertheless glad to have it within its own covers for easy reference. As Mr. Pickles points out, all four of the translations of the new French Constitution which had been published before the present article appeared were unsatisfactory. Mr. Pickles' new translation in this booklet seems much better. It is neither exactly literal (which would lead to too much obscurity) nor a mere gloss. In particular the author has wisely footnoted the exact French terms used in the Constitution where no precise English equivalent can be found for the text. And perhaps most important of all, this translation includes the first account to be given in English of the "organic laws" which supplement the text of the Constitution, and which were specifically provided for in the document of October 4. (By a very rough analogy the organic laws might be said to stand in relation to the Constitution as statutory instruments do to a statute in England.) Here then is a clear, readable translation of the whole Constitution, together with a critical commentary Article by Article, and with the organic laws inserted by way of footnotes to the relevant Articles. Precedents decided during the first twelve months after the Constitution came into force are also duly noted in the footnotes, and the author has included his own forecasts for the future. It is difficult to pick out parts of the booklet as being of especial interest, for, as is well known, the whole Constitution contains much which is novel or striking. For the reviewer the Articles on the Community have been a fascination. As Mr. Pickles points out, the Community is

not a French version of the Commonwealth, nor is it a federation or confederation on any model so far known. Yet it has quite a lot in common with both.

The author is very doubtful whether this Constitution can survive for long. The average life of each French Constitution since 1791 has been about twelve years, and this one, perhaps because of its hasty contrivance in perilous days, is peculiarly ill-drafted and full of obscurities and ambiguities. What is more, the key to the Constitution is the enormous powers of the President, with the concomitant burdens upon him. Mr. Pickles considers that the President's powers are not only too great to be tolerated for long by a democracy, or in the hands of any but the present President, but that also they are too many to be exercised efficiently by one man, particularly since the President is unlikely to be a young man. Other factors which may lead to its downfall are the very odd division of executive powers, the possibility of a divorce between policy and public opinion, and the risk of frustration in a Parliament which must be regarded as now in fact subordinate to the executive. These criticisms are well-balanced, and there is good value in the fifty pages.

D. C. M. Yardley.

Civil Liberties and Canadian Federalism. By F. R. Scott. [Toronto: University Press. London: Oxford University Press. 1959. 58 pp. 16s. net.]

The preamble to the British North America Act, 1867, recites the desire of the confederating provinces to be federally united into one Dominion "with a constitution similar in principle to that of the United Kingdom." The principle that the protection of fundamental human rights should not be founded on any general legislative guarantee was therefore adopted in the framing of the Canadian Constitution. Only the continuance of rights concerning denominational schools and the use of the English and French languages for certain official purposes were specifically guaranteed. The defence of civil liberties against provincial encroachments was left to the ordinary law of the land and to the judicious exercise of the Governor-General's power to disallow provincial legislation—a power more readily exercised against a relatively weak province like Alberta than against a powerful province like Quebec.

Until 1950 few important cases affecting civil liberties had reached the Supreme Court of Canada, let alone the Judicial Committee of the Privy Council; and the overwhelming bulk of literature on Canadian constitutional law was concerned with the interpretation of the distribution of legislative powers between the Centre and the provinces. The scene has now been transformed by a series of extremely interesting cases, most of which have arisen out of action taken by the authorities in Quebec against members of the Jehovah's Witnesses sect and other religious and political minority groups. The Supreme Court's record in these cases is impressive. It has narrowed the definition of sedition; it has curbed excesses of police powers; it has held that a province cannot validly impose on the community a duty to observe the practices of one religion and has declared the objectionable Quebec Padlock Act to be *ultra vires*. And it has awarded heavy damages against the Prime Minister of Quebec for having wrongfully caused the licence of a restaurant proprietor (who had had the temerity to furnish bail for arrested Jehovah's Witnesses) to be cancelled: see *Roncarelli* v. *Duplessis* [1959] S.C.R. 122. In most of these cases the Supreme Court has reversed the Quebec courts.

The cases show that even in the absence of a comprehensive guarantee of fundamental rights the ordinary rules of statutory interpretation and the principles of the common law and the civil law can be made to yield a substantial measure of legal protection for the individual against oppressive interference with his liberties. But doubts have arisen in Canada whether

this measure of protection is sufficient. Reflections on the Universal Declaration of Human Rights and the fundamental rights provisions of modern constitutions, and the impact of recent decisions of the United States Supreme Court, have contributed to the building up of pressure in favour of a Canadian Bill of Rights. Legisation to restrict the competence of the provinces by entrenching a Bill of Rights in the Constitution could only be enacted by the United Kingdom Parliament and at the request of Canada. Although such a request could be made, as a matter of law, without the consent of the provinces, a request made without their consent would raise a political hurricane. The present Canadian Government decided to go a quarter of the way towards attacking the problem by introducing a Bill designed mainly to strengthen the existing presumptions of legislative intent in favour of certain enumerated individual rights within the sphere of federal jurisdiction. The Bill was passed by the Canadian House of Commons on August 4, 1960; there is a melancholy significance in the fact that it was almost impossible to follow its progress by reading the British Press. Its implications were the subject of a valuable symposium of articles in a recent number of the *Canadian Bar Review*.

This was the context in which Professor F. R. Scott delivered the Allan B. Plaunt Memorial Lectures at Carleton University, Ottawa. The theme of civil liberties in Canada is one on which Professor Scott can speak with peculiar authority. For he is an eminent teacher of public law at McGill University in Montreal; he was one of the first Canadian lawyers to advocate the adoption of a Bill of Rights; and he led for the plaintiff in *Roncarelli* v. *Duplessis*. As one would expect, his lectures are vigorous, topical and informative, and their publication will be welcomed (despite the price) by many readers who have no specialised knowledge of Canadian constitutional law. His survey of the Canadian scene makes one wonder all the more at the John Bullish inability of so many English lawyers to see any merit in constitutional guarantees of fundamental rights. Professor Scott makes out a powerful case for their adoption in Canada; and in countries where political traditions of tolerance are less developed it is often difficult to see what other safeguard can usefully be constructed for the protection of racial and other minorities against discrimination by a majority community.

In Professor Scott's view, however, the time for the constitutional entrenchment of a Canadian Bill of Rights is not yet. It will come when Canadians have agreed on a procedure for constitutional amendment that will dispense with requests to Westminster, and when they have fashioned a new constitutional instrument of their own. "We must eventually nationalise the constitution, as we have nationalised the Crown." The prospects of securing the requisite measure of agreement in the near future are poor; but Professor Scott is both a radical libertarian and an optimist.

S. A. de Smith.

Some Problems of the Constitution. By Geoffrey Marshall and Graeme C. Moodie. [London: Hutchinson & Co., Ltd. 1959. 189 pp. £1 1s. net.]

One of the oddities of contemporary English legal writing is the scarcity of contributions to that part of constitutional law which falls outside the scope of administrative law. In the nineteen thirties Wade and Phillips and Keir and Lawson wrote their valuable students' textbooks but nothing new has since appeared other than new editions of these and other students' textbooks (especially the continuation by Hood Phillips of a pre-war text on the subject). Nor have constitutional lawyers written any monographs since the important works of Jennings before the war. Articles are also few, and one doubts whether much research is being done. The explanation seems to be this:

comparatively little of topical constitutional law is responsive to the conventional "matching of the cases" kind of research, and lawyers do not take readily to other forms of research; if they do, they soon cease to be "law teachers," *e.g.*, Jennings and Robson. One is tempted to say that the *Spectator* and the *Economist* have made a more prolific and regular contribution to constitutional law in the post-war period than lawyers.

There is, of course, much important work to be done, and the sources are readily available in Hansard and other parliamentary papers, blue books and other governmental sources, and in political memoirs. Fortunately for the subject, the rapidly growing corps of political scientists have done much to fill the gap. These essays by two university teachers in political studies are an outstanding example. They have brought up to date the discussion of problems of conventions, ministerial responsibility and powers and parliamentary privilege by making full use of these sources. Moreover they bring to the subject a skill in linguistic analysis which sheds new light upon it—see the criticism at p. 71 of Wade and Phillips on their use of the word "responsible" in two different senses, or (at p. 126) of the refusal of the Committee on Minister's Powers to define "dispute," "party," "evidence."

This volume of essays is indispensable for the student of constitutional law. Essential matters are discussed which are scarcely dealt with at all in constitutional law texts: the status of law officers; the duty of a Minister to answer parliamentary questions, the relation between Government and Party, the Deputy Prime Minister, pressure groups. Even where one might have thought that lawyers would have the advantage, *e.g.*, the systematic treatment of the content of those parliamentary privileges which are of topical importance, this work is far more informative: can it be that lawyers have not accustomed themselves to treating Hansard and the Reports of the Committee of Privileges as the law reports for the law of Parliament? When the discussion touches on pure law their touch is equally sure and the text has a vitality, freshness and frankness which is seldom found in standard works on constitutional law—*e.g.*, the account by Lord Atkin's daughter of the unsuccessful attempt by her father's colleagues to have him delete his strictures on them from his judgment in *Liversidge* v. *Anderson*. One would, however, like to know which decisions of the International Court of Justice ought to be dealt with in a course on constitutional law (see p. 23).

Perhaps these excellent essays will stimulate a revival among lawyers of interest in constitutional law.

Harry Street.

Prideaux's Forms and Precedents in Conveyancing. Vol. 2, 25th edition, by V. G. H. Hallett, A. P. McNabb and T. A. Blanco White, Barristers-at-Law. [London: Stevens & Sons, Ltd. and The Solicitors' Law Stationery Society, Ltd. £6 6s. net.]

Looking back to the first edition of *Prideaux* in conformity with the Property Acts, 1925 (the 22nd edition of the work and the one which had the imprimatur of the senior editorship of Sir Benjamin Cherry, so outstandingly associated with the formulation of these statutes), one finds the dissertation on Mortgages (and "dissertations" were one of the characteristic features of *Prideaux*) comprised within sixty-six pages—that in the current edition occupies but forty-two: doubtless that was due to the fact that the "Cherry" edition had more to do with introductory explanation of the conveyancing methods of mortgage created or renewed by the then new legislation. In the edition immediately preceding the one in review, namely the 24th edition edited by the late Mr. J. B. Richardson (a monumental task to be taken in hand by one alone) precisely the

same number of pages quantitatively comprised the dissertation. But a conspicuous divergence of viewpoint was disclosed in the latter as regards the form of mortgage. At pp. 337, 338 of the "Richardson" edition the late learned editor observed that "in former editions the opinion has been expressed that a legal charge is preferable to a mortgage by demise or sub-demise but the present editor is unable to take this view. It is highly possible that in all cases where difficulties arise the courts will hold that a legal chargee is to be treated for all purposes as having a legal term vested in him. . . . But if the courts do not adopt this course, the question may arise whether a legal chargee in possession can sue tenants for rents in arrear or breaches of covenant or distrain for rent in arrear. . . . It should also be noted that many experienced conveyancers, arguing that the possession of an actual term, instead of merely the rights incident to a term, may, in unforeseen circumstances, be an advantage, prefer to mortgage by demise. . . ." In a note on p. 338 thereof he observed: "In the present editor's experience the following mistakes are sometimes made in a legal charge: (1) omission of the covenant to pay the principal sum and interest; (2) failure to state expressly or impliedly the date on which the legal right of redemption ceases."

The present editors, however, do not share this view and return to the "Cherry" preference. They observe (p. 342) that a "chargee . . . would appear to be in quite as good a position as if he has a legal term of years vested in him. . . . He may indeed be in a better position in one instance for it would seem that a chargee by way of legal mortgage of a lease may not have to obtain the consent of the landlord to the charge where in the lease there is merely a common form clause against assigning, under-letting or parting with possession because the charge is none of these things," and they refer to *Grand Junction Co., Ltd.* v. *Bates* [1954] 2 Q.B. 160. They do, however, add that "it might assist to insert in the legal charge a statement that for the purposes of the charge the legal right of redemption is to cease after the date fixed for repayment." The Precedents favour the Legal Charge, but there are alternatives in many cases by way of demise. There is a good discussion on clogs on the Equity of Redemption.

As customary in *Prideaux*, "Forms" are separated from "Precedents" and there are sixty-three pages of Forms as compared with sixty-one pages in the preceding edition.

The Town Planning Forms may have to be reconsidered from time to time in the light of any subsequent legislation. Precedents of Deeds of Substituted Security are a welcome addition and the Form of Charge in the case of mortgage of registered land has been set out in full with the statutory annotations. There are 295 pages of Precedents of Mortgages as compared with 275 in the former edition, and it would be a very extraordinary transaction which would not find a Precedent with notes capable of being adapted thereto. Stylistically the Precedents have the typical "Prideaux" touch. The section on Bills of Sale has been usefully expanded and that on Powers of Attorney has been brought to date. The Partnership section now includes a Precedent of Medical Partnership under the National Health Acts. The most radical changes in the work are those in the section dealing with Patents, and it has been largely rewritten in relation to the changes in commercial practice and the forms and precedents have been remodelled to conform therewith.

The "Cherry" edition did not put leases into Volume 2, but into Volume 3. The present edition, as with the preceding edition, includes Leases in the present volume which, with its 1,204 pages of Dissertations, Forms and Precedents in addition to seventy-two of preliminaries, makes it into a very considerable volume, and hardly of the easily portable kind. The section on Leases is the most largely reconstructed, mainly resultant upon the extensive statutory developments which affect the relationship of Landlord and Tenant in the various spheres of their omnipresence. The section on Distress heretofore appearing has been deleted, as not of direct concern to the draftsman as such. Referring to the Rent Acts generally, the editors wisely observe "Any

attempt at an account of these Acts, short of a full length disquisition would be misleading. Moreover the legislation on the subject is amended at frequent intervals. Reference should be made to the standard works on the subject. . . . The following statement is intended as a rough guide to enable the draftsman to consider whether he must look further," an admirable cautionary note which might well find its way into other works. One would have liked to have seen retained Mr. Richardson's statement in the former edition relating to these statutes that it is "quite certain that they will be construed for several years and it is hoped that they will be consolidated and simplified." How necessary is that simplification is illustrated by the apt observation in the present edition that it should be particularly noted "the Furnished House (Rent Control) Act, 1946, is not one of the Rent Acts."

The summarisation of the general law of Landlord and Tenant seems excellently done. The necessity of being altered in respect of Town Planning legislation is testified by note 35a on page 125 where it is stated "The Town and Country Planning Bill now before Parliament (December 1958) will be known if passed in the present Session as The Town and Country Planning Act, 1958," the Note referring to the definition of the Town and Country Planning Acts in a Form appearing on p. 125. There is a comprehensive Precedent of the Lease of a Flat, and applicable to that of an Office. One feels, however, that a "second helping" would have been acceptable.

The forty-one pages of Index seem generally correct, but that there are lapses is proved by the reference to *Re Adams and the Kensington Vestry*, 27 Ch.D. 394, and *Gentle* v. *Faulkner* [1900] 2 Q.B. 267 as to be found on p. 122 of the volume, but neither appear there. The Tables of Statutes extend to 1958. However, there is very much more in *Prideaux* than the Tables of Contents would suggest. The editorial allocation is as follows: Mr. Hallett edited Leases, Powers of Attorney and Partnership; Mr. McNabb, Mortgages, Bills of Sale, Bonds, and Deeds of Arrangement; and Mr. Blanco White, Patents. All are to be congratulated upon the achievement of much success in a most difficult task. Any volume of Conveyancing Precedents which covers Mortgages and Leases is certain to be in the most frequent use, and stoutly bound as the volume is, it will have to stand much handling but that it will hold good, like the book itself, there is every reason to anticipate. It should wear well and worthily true to the high traditions to which it succeeds.

Bertram B. Benas.

Employer's Liability at Common Law. By John Munkman. [London: Butterworth & Co., Ltd. 1959. lxii + 489 and (index) 43 pp. 42s. 6d. net.]

The special place which this work has won for itself in the literature of its subject is attested by the frequency with which it is now cited in current editions of textbooks on tort such as *Winfield* and *Salmond*. This welcome new edition follows the general scheme of its predecessors—a general outline of the common law of negligence in so far as it applies to employment problems, then a full treatment of liability for breach of statutory duty followed by a consideration of various defences and some matters of practice and procedure. Appendices contain a glossary of legal terms, a brief explanation of the National Insurance (Industrial Injuries) Act, 1946, and a note on the limits of an employer's liability for the loss by theft of his employee's property. Finally, a number of recent Statutory Instruments and the Bill form of what is now the Factories Act, 1959, conclude the book. The necessity for these addenda forcibly illustrates the many rapid developments taking place in this field of the law. The author calls attention in the foreword to the large volume of both legislation and case-law which has appeared since the last edition and which now finds a place in this edition. He goes

on to say that limitations of space coupled with the fact that adequate treatment is now available elsewhere (*inter alia* in another work of his own) have compelled him to drop the former chapter on damages. He also extends a general invitation to reviewers to point out obsolete material which could be omitted in further editions. This is by no means an easy challenge to accept, but, despite the author's explicit defence for the purposes of this edition of a full treatment of the old law of occupier's liability, perhaps a more economical treatment will be possible in the next edition. A few pages could perhaps also be saved by dropping the first two appendices (a glossary of legal terms and an explanation of the National Insurance (Industrial Injuries) scheme. The foreword contains some interesting remarks on what the author considers to be defects in the present administration and drafting of protective legislation. Thus he would have preferred the administration of the Factories Acts to remain with the Home Office, and he calls attention to defects and inadequacies in the Shipbuilding Regulations, in legislative protection for those engaged in engineering operations and in the law relating to the fencing of dangerous machinery. He says that in deference to reviewers of previous editions he has included more numerous references to periodical literature. Although it would be possible to suggest further inclusions, the work is now better served in this respect than the general run of practitioners' manuals.

A few points of comment must now be made. It is a little difficult to understand why the discussion of contributory negligence and other defences is segregated from the other common law topics by being placed at the end of the book. Although the book will probably be used more frequently as a work of reference than a connected narrative, it is nevertheless suggested that there could be advantages in dealing with contributory negligence prior to treating of liability for breach of statutory duty, especially as incidental reference is made to the defence in dealing with some of the cases on the legislative provisions.

The footnote at p. 32 explaining the place of duty in the tort of negligence could perhaps be improved by mention of the policy aspect of duty—its function as a limitation on liability for the harmful consequences of carelessness. *Perry* v. *Kendricks* [1956] 1 All E.R. 154 could be added to the authorities cited in the second note on p. 63 on *Rylands* v. *Fletcher* and personal injuries. Mention might have been made of *L. C. C.* v. *Cattermoles* [1953] 1 W.L.R. 997 in dealing with the effect of prohibition on the scope of employment at p. 74. The footnote to p. 75 seems to indicate that the author favours a combination of the "masters' tort" and "servants' tort" views in the *Broom* v. *Morgan* controversy. Hence Dr. Glanville Williams' article "Vicarious Liability. Tort of the Master or Tort of the Servant" 72 L.Q.R. 522 might have been mentioned. At p. 77 the treatment of "casual" or "collateral" negligence on the part of an independent contractor seems to be unduly cursory. The statement of the effect of *Gledhill* v. *Liverpool Abattoir Co., Ltd.* [1957] 3 All E.R. 117 might lead the reader to suppose that the employers were exonerated. In fact they were held liable at first instance and did not appeal.

The author falls into common error in supposing (see p. 146) that *Thomson* v. *Cremin* was not reported until 1953. It was in fact very fully reported (with arguments of counsel) at the time when it was decided in 71 Lloyd's List Reports 1. See a note in 19 M.L.R. 288. A final small suggestion might be that *Buckland* v. *Guildford Gas* [1949] 1 K.B. 410 should be cited at p. 157 in order to complete the outline of possible liability to a trespasser.

Printing and production are excellent, but a table of Statutory Instruments would be a welcome addition. Misprints are few, though one or two case references are wrongly given. In conclusion, a large number of footnotes, which must have been inserted at a very late stage, show what trouble has been taken to present an up-to-date picture of the law.

A. H. Hudson.

F.O.B. Contracts. By David M. Sassoon. [London: Stevens & Sons, Ltd. 1960. xxiii and 147 pp. 35s. net.]

The author deserves congratulations on the choice of his subject and on its presentation. Not many monographs are published in this country which, like the present one, deal with an important subject in so scholarly a manner and so exhaustively. Pride of place belongs to the first chapter, where the various kinds of f.o.b. contract are classified. It should be invaluable to the academic lawyer and the practitioner handling an f.o.b. case; he will find arguments galore whichever side he is asked to advise. Other chapters deal with payment, acceptance and rejection, marine insurance, and conflict of laws. Appendices contain specimen forms of contract.

This is the first analytical study of this form of contract in English legal literature, and it reveals the jungle of opinions held in the trade concerning the respective duties of buyer and seller under the various forms in which the f.o.b. contract appears. It would be wrong to blame modern developments for this state of affairs. Thirty years ago a comprehensive book on the law of oversea sale was published in Germany,[1] showing on the basis of German, English and French case law and of opinions expressed by chambers of commerce and trade associations the bewildering state of the law and the understandably frequent ignorance of business men regarding their rights and duties. For English law the author's analysis has made it possible for the determined student to see the wood despite all the trees.

What we now need is a companion study written by an economist, for it is odd that so little is known about the origin of the contract and about the factors influencing the choice of f.o.b. rather than c.i.f., ex ship or other terms. As regards the origin case law is of no help; all the early cases referred to by the author show the f.o.b. term in existence and apparently accepted, and most of the cases do not even deal with specific f.o.b. problems but in the first place with the seller's right to stop the goods in transit. As regards the choice of terms the author, at one stage, explains that where articles appear in price lists an f.o.b. price must be quoted because freight and insurance costs can, of course, not be known until the destination is clear, but, even in these circumstances, other terms may eventually be negotiated. The author also makes a somewhat cryptic remark in the preface, ascribing the growing frequency of f.o.b. contracts to currency restrictions in various countries.

One wonders whether this does not reveal a misunderstanding. In the first place, of course, commercial considerations as between buyer and seller determine the choice of terms; the stronger party will impose those he prefers. A buyer will presumably prefer c.i.f. terms, which free him from the difficulty of having to accept the uncertainty of fluctuating freight rates. In addition, however, the choice has become a matter of national policy, almost of international power politics. Hamburg importers, for instance, we are told,[2] receive frequent appeals from German shipowners to insist on f.o.b. terms and then to make arrangements for the carriage of the commodities in German vessels.

Elsewhere Governments take a hand. In Pakistan and Mexico, for example, importers are forbidden by law to buy abroad on c.i.f. terms, so as to compel them to insure their cargoes with insurers in the home market. Some other countries enforce this support of their insurance business indirectly by refusing foreign exchange to pay for insurance abroad.[3]

O. C. Giles.

[1] Hans Grossmann-Doerth, *Das Recht des Ueberseekaufs*, Mannheim, Berlin, Leipzig, 1930, especially pp. 146 *et seq.*

[2] Walter Grimm, *Der Einfuhrhandel*, 3rd ed., Hamburg, 1958, p. 38.

[3] I am indebted for this information to the British National Committee of the International Chamber of Commerce.

The Legal Aspects of Goods as Banking Security. By Maurice Megrah, being the Gilbart Lectures for 1959. [London: published for the Institute of Bankers. 1959. 44 pp. No price given.]

With this course Mr. Megrah brings to an end this series of Gilbart Lectures, contemporaneously with his retirement from the secretaryship of the Institute of Bankers which he has held with distinction for many years. It may be recalled that in the earlier courses he opened up a number of aspects of the working of the banker's documentary credit which had not previously been explored, at any rate in this country. He is here for the most part concerned with a much better known topic, which is, of course, very much in point in the final stages of the operation of a documentary credit; so that the interest of the earlier lectures is hardly maintained. That is from the point of view of those who are conversant with this rather specialised branch of the law; probably the fact that practical aspects of a more familiar subject are being discussed will make them of greater value to the ordinary lawyer.

Bankers are naturally not much interested in taking chattel property as such for the purpose of obtaining security: it is normally too cumbersome and gives rise to tiresome registration problems under the Bills of Sale Acts. The banker almost always takes documents of title to goods either by way of pledge or by way of what he calls hypothecation: tending as Mr. Megrah points out to confuse two very different methods. The transfer of these documents gave rise to much interesting common law and led to the passing of the Factors Acts. Perhaps the most important question here is the application of the rule *nemo dat quod non habet* and the problem of how far these documents are negotiable, if at all. In this connection, of course, there was established the unique position of the bill of lading. The value of Mr. Megrah's exposition of this complicated and difficult section of the law will be found, I think, in the close way that he relates it to banking business. He has nothing very new to say on the law, and I sometimes found myself doubtful as to the soundness of his general observations.

Owing to the non-negotiable character of documents of title to goods attornment by the particular warehouseman or other bailee who has the actual custody of the goods becomes of particular importance, and this aspect of the matter is well brought out. Mr. Megrah seems to take the view that when the bailee attorns he becomes liable to his attornee in any event, even if the original bailor had no title; for he says "attornment is necessary to give the transferee an indefeasible title." This would certainly be a hard doctrine if it were correct and the authority cited does not seem to go so far: I do not believe the cases establish it.

Again I think that Mr. Megrah goes too far when he says that documents of title to goods may possess the quality of full negotiability (p. 5), though he admits that they rarely do. The only example of such full negotiability which he actually gives (on a later page) is the warrant issued by the Port of London Authority under the Port of London (Consolidation) Act, 1920, s. 166. This section provides in effect that the goods specified in such a warrant shall "for all purposes be deemed the property" of the indorsee-holder thereof. There seems to have been no case where stolen goods have come under the protection, so to speak, of such a warrant, but it seems to be generally considered that we have here a case of full negotiability (*cf.* Purchase: *Documents of Title to Goods*, p. 65). Perhaps Mr. Megrah means that it is unique, as I believe it to be: if so he does not make his position clear. Dr. Purchase took the view that the same position prevails under local Acts on the Mersey and at Manchester, but these are differently worded.

Mr. Megrah brings out very clearly that except in the case of the bill of lading (and surely the position would be the same with a Port of London certificate) the pledge of a document of title does not effectively pledge the

goods which it represents. He even confines the effectiveness of the pledge of a bill of lading to the period while the goods are at sea, on the ground that it is not then possible to pledge the goods themselves. Some sentences in the judgment of Lord Wright in *Official Assignee of Madras* v. *Mercantile Bank of India, Ltd.* [1935] A.C. 53, a judgment to which he naturally attaches great importance, perhaps support this view, for that eminent commercial lawyer does say "if the goods are in transit, the owner can, by transferring the documents of title, give a valid pledge" (presumably he is referring to the bills of lading). I know of no direct authority, however, which confirms the effectiveness of the pledge of a bill of lading to the sea transit: the articles in *Scrutton on Charterparties and Bills of Lading* (§§ 73–74) which deal with the pledging of bills of lading are not so qualified. Indeed, at a later point in the same passage of his judgment Lord Wright himself seems to widen the area of pledgeability. I think that bankers and others dealing in bills of lading may be upset at Mr. Megrah's statement of the law on this point which would appear somewhat to reduce the value of the bill of lading as a security.

The normal method of trying to get over the fact that the pledge of the ordinary document of title to goods does not effectively pledge the goods themselves is by means of the so-called hypothecation. The use of this foreign term only introduces confusion—hypothec is not known in English law—and it is a pity that Mr. Megrah uses it without explaining its meaning. He very properly condemns the erroneous use of the term "lien" with much the same meaning, causing increased confusion. As Mr. Megrah himself says, the effect is to give a charge over the goods, which he aptly likens to a floating charge under the Companies Act, 1948, though it is perhaps doubtful how far this analogy can be safely pushed.

Difficult problems arise here as to the need for registration and are particularly important for bankers who dislike having to concern themselves with such matters. Mr. Megrah deals with this subject very clearly, showing that, so long as we are concerned with documents of title, registration is unnecessary, and drawing attention to the important exceptional cases where registration has been held to be necessary and bankers have been caught out.

The other main problem which arises in connection with the security aspect of the documentary credit is that of enabling the customer-buyer to effect the sub-sales (by means of which he will recoup his banker for the advances made), and make deliveries thereunder. This involves letting him have back the bill of lading or other document of title, which is obviously somewhat risky. For handling this situation the letter of trust and the analogous trust receipt have been invented. Here again there may be problems as to registration, and also as to priorities. There is nothing very much of a novel character to be said on the legal aspects of this matter, but what is said here is very much to the point.

Mr. Megrah next considers the principal types of document of title to goods in detail and it is in this section that he expands what he has to say about their negotiability. Finally there is a useful section on Export Credits Guarantee Department Policies. Though strictly speaking outside the scope of his title, Mr. Megrah's readers will be grateful to him for giving guidance on a subject on which there is very little available authority.

There are unfortunately quite a number of uncorrected printer's errors. I know from my own experience that, because of the examination, the publication of the Gilbart Lectures has to be carried through very rapidly and that there is little time for proof correction but some of the mistakes found here may seriously confuse and possibly mislead many of the young bank officers for whom the lectures are intended. Thus on p. 29 six lines from the bottom "presents" should be "represents" and on p. 32 at the end of the first paragraph the word "owner" is clearly wrong; ought it to be disposition? Again at the top of p. 3, buyer and seller seem to have become transposed.

C.

Die nennwertlose Aktie als Rechtsproblem. Rechtsvergleichende Untersuchung unter besonderer Berücksichtigung des amerikanischen Rechts. By Helmut Coing, Professor at the University of Frankfurt on Main, and Heinrich Kronstein, Professor at the University of Frankfurt on Main and at the Georgetown University, Washington, U.S.A. [Vittorio Klostermann, Frankfurt, Main. 1959. 120 pp. DM 12.50.]

The introduction of non-par-value shares has been under consideration in Germany for well over thirty years, *i.e.*, for a far longer time than in this country. In the course of these discussions leading industrial circles represented by various influential organisations have recently argued that the question required a more thorough investigation than it had hitherto received. The German Industrial and Commercial Congress (Deutsche Industrie-und Handelstag) even had the perhaps still unusual insight to suggest that an investigation of foreign legal systems should be undertaken. Shares of non-par-value are permitted in the U.S.A., Canada, Mexico, Belgium, Japan, and in that paradise of comparative lawyers, the Principality of Liechtenstein. The present work deals with three of these systems, *i.e.*, the laws of the U.S.A., Belgium and—with appropriate brevity—Liechtenstein. In a concise introductory chapter the authors survey the problems and the trend of the debate in Germany. The second part of the book, which deals with the development of non-par-value shares in the law of the U.S.A., forms the bulk of the work. The two summaries of Belgian and Liechtenstein law, which follow, could be very much shorter because of the greater similarity of the Belgian and Liechtenstein conceptions to those of German law. The learned authors are in favour of the introduction of non-par-value shares. They distinguish between two types of non-par-value shares in accordance with whether or not the articles of association state the par-value of the capital of the company. In their view both types are capable of being introduced into German law, provided certain safeguards are adopted in order to secure both the shareholders and the creditors of the company.

There can be no doubt that there are weighty arguments in favour of the author's view. These are well and succinctly set forth by them. But one may perhaps wonder whether the material submitted by them really strengthens their case. Professor Kronstein's masterly and most attractively written survey of the development in the U.S.A. leaves one with the impression that the U.S. courts failed to appreciate the importance of the rules relating to and resulting from par value and thereby destroyed a good deal of the ground which the legislator had laid. When the ground was finally given up by the introduction of non-par-value shares, little was lost because most of what could be lost had already been lost. The re-establishment of safety for creditors and shareholders alike by the creation of the Securities and Exchange Commission and the Securities Act, 1933, is certainly most impressive, but one wonders whether this is a satisfactory precedent for Europe where the number and relative importance of corporations whose shares are not dealt with on the Stock Exchange is far larger in comparison than it is in the U.S.A. The fact that the non-par-value share has not been adopted by more than a severely restricted number of corporations even in the U.S.A. makes it a matter for doubt whether the need for their introduction is really as great as is sometimes —though not, of course, by the two learned authors—made out. The fact that there is still criticism in Belgium, where non-par-value shares were introduced thirty years ago, is not encouraging.

The fact that at least one reader has come to the conclusion after perusing this work that the case for the non-par-value share has not been fully made out, should be taken as an indication of the scrupulous fairness with which the authors have presented their material. There can be no doubt that just because of this fairness they have made a notable contribution to a debate which is not likely soon to be ended. E. J. Cohn.

The Exploitation and Conservation of the Resources of the Sea. By F. V. Garcia Amador. Second and enlarged edition. [Leyden: A. W. Sythoff. 1959. xiv and 212 pp. F. 26.75.]

The concept of the freedom of the high seas is in itself essentially a negative one but, as Professor Gidel has observed, it is a negative idea with positive consequences. A state opposes the establishment of sovereignties over the high seas simply because it wishes to make free use of them itself. The economics and political ideas of the nineteenth century maritime powers were geared to the idea of *mare liberum* and there was no one to deny them their freedom.

The economics of the situation have now changed, as have the political factors, and the traditional concept of the freedom of the high seas is no more. If anything the phrase nowadays means the residue of freedom which the members of the international community have determined shall remain.

Dr. Amador's book is immediately concerned with the resources of the high seas and the sea bed. This is a study of the economic, social, technical and political considerations involved in the conservation and exploitation of these resources, but the study as a whole is made against the background of the traditional legal concepts. It says much for the depth of Dr. Amador's knowledge of the subject that he is equally at home with the social and economic considerations as he is with the legal material. His is an informed and an appreciative study. He realises that traditional concepts must go, but established interests and the fundamental postulates on which the legal régime of the sea has been based remain.

This is the first full-scale work on the high seas to appear since the Geneva Convention 1958. It is said to be the second edition of a book first published in Spanish in 1956 but in fact it is virtually a new work based on the recent convention together with events leading up to it. As a member of the International Law Commission and a participant in the Geneva Convention Dr. Amador is well qualified for his task.

The book itself is concerned largely with three problems each of which forms a separate part of the book. They are: the problem of the territorial sea and of the contiguous zone, the extension of state competence over the resources of the sea bed, and the conservation of the living resources of the high seas. If anything Dr. Amador is least happy in his discussion of the territorial sea. This may well be the result of his work being confined to the exploitation of the resources of the territorial sea. Whilst it is true that claims to an extended territorial sea are largely the result of a desire to obtain exclusive fishing rights, there are many other factors involved. Dr. Amador is not concerned so much with these other factors and one is left with something less than a complete picture. This criticism apart the study is an exhaustive and an illuminating one and of the high standard which one would expect from the author.

It is unfortunate that the work is marred by a number of misprints and misspellings. On page 70 one reads ". . . the sedentary species are, so to speak, domiciled there-species that support the local fishing industry . . ." The reader whose imagination boggles at the prospect of there-species domiciled on the floor of the ocean may be forgiven but a second reading suggests the passage might better read: ". . . the sedentary species are, so to speak, domiciled there —species that support the local fishing industry . . ."; "there" being the continental shelf. There are more than sixty such printing and spelling errors in some two hundred pages which is an unusually high quota, nor is one helped by the inclusion of the galley references.

The book is intelligently written and on the whole Dr. Amador's style is of the highest order although occasionally there are slight awkwardnesses of expression. Large sections of the work are written, rather embarrassingly, in the first person plural and the reader finds himself apparently committed to the author's opinions. This author-created intimacy is, of course, less

embarrassing in a work of such soundness but it is not calculated to appeal to many Anglo-Saxon readers.

This is a first-class study marred by unfortunate errors. If it becomes necessary to supplement it as a result of the Geneva Conference, 1960, one hopes the author and his publishers will consider bringing out a revised edition eradicating the present errors and adding an index which is so essential to a work of this nature. It is certain that the work is one which can establish itself as the most authoritative thesis on the subject.

J. A. Andrews.

The Crime of State. Vol. I, Humanicide; Vol. II, Genocide. By Pieter N. Drost. [Leyden: A. W. Sythoff. Price unstated.]

The author of this two-volume work was the Professor of International Law and Politics in the University of Indonesia, until, as he says, "political developments forced my resignation." In Volume I, Professor Drost "purports to persuade the reader of certain principles and proposals of international legal policy for the promotion of collective peace," and Volume II is an analysis of the present legal position following the Genocide Convention and the Nuremberg Judgment.

The scope of the work is immense, for the author starts, as it were, at the bottom with a consideration of the notion of Justice—both personal and social, national and international. "Man's cry for justice calls for abolition of social privilege, of economic advantage, of political prerogative based on discrimination by reason of clan, caste, class, or clique of any denomination or persuasion."

From there he turns to international law which "should act directly on the rational person individually and not merely through the intermediary of the legal person of the state collectively in order to maintain peace through justice in the international community."

The author then considers what he calls "inspirational law" and contrasts it with "existential law." "Law," he writes, "being both what it was and what it becomes and moving ever from what it stood for to what it strives for, stools on two pillars of social life, material interest and moral insight."

The author's experience in Asia has enabled him to see international law, and some of the political problems that it faces, in a wide and refreshing perspective. "The Eastern student," he says, "reads about the general principles of law recognised by civilised nations as part of international law but realises that the principles of national law as generally regarded by Western nations are violated in the West as much as in the East"; and again, "It requires little foresight to imagine a new school of international law arising in Far Eastern countries," and "Western rules of law brought to the East have done little to persuade the Eastern peoples that Western justice as practised in the West and as envisaged under a Western law of nations would necessarily bring them nearer to their own ideals of social and international justice."

The Professor's views on some parts of the law will, one feels, be challenged, which is only evidence of the necessity for him to present them. When speaking of treaties between Eastern and Western countries (he pauses here to point to "these Eurocentric expressions") he first states that "after four centuries of foreign aggression and domination of Western powers in the East there is little room for indignation or surprise in seeing Eastern masters of state hesitate to conclude political treaties with Western states." Should, however, they be concluded, "the weaker partner under the political arrangement more likely than not will want to be freed from the onerous, cumbersome, unbecoming and derogatory obligation and will try to attain this as soon as it has become sufficiently strong. If the dynamic principle of international law laid down in the implied condition of *rebus sic stantibus* is never recognised, there are bound to occur instances of change in conventional relations outside the law. It is

pure legalism—historically incorrect and politically unwise—to maintain that the clause is unknown and can have no validity in positive international law. . . . *Pacta sunt servanda*! yes. *Pacta sunt perpetua*? No."

It is at about this stage in the book, however, that a feeling of submersion assails one. German concentration camps cannot be mentioned without a preliminary survey of Ancient, Medieval and Modern Slavery, Mansfield's Somerset judgment and details of a prize essay in Cambridge University in 1785. Reference to genocide takes one back to the sack of Carthage, 146 B.C., to the night of St. Briccius in November 1002 when all Danes living under the Danelaw granted in 878 by King Alfred the Great were murdered at the command of King Ethelred II, and to Asoka, ancient Emperor of India (±272–232 B.C.) who declared in his thirteenth rock edict that 400,000 had been slain in cold blood but "repentance made him a Buddhist monk."

Similar to this unbalance, a mere ten pages on the formation of the League and the United Nations is preceded by thirty pages on the history of Greek and Medieval natural law, and the consideration of the right of war under the Covenant starts with the views of Gratianus (±1150).

At this point one turns for an Index, but Index is there none. One is left with much of great merit buried under a mass of erudition and only hard work and application can get it out.

Volume II on the United Nations Legislation and International Criminal Law is again a mine of material, equally unindexed, upon the history of the drafting and acceptance of the United Nations Convention on Genocide. The author's views on the final wording of the Convention may perhaps be gleaned from the subheadings of his section on "Final Criticisms." These read: "Pointless Preamble, Purposeless Article I, Deficient Definition in Article II, Problematic Provisions of Article III, Perfunctory Provision of Article IV, Needless Article V, Useless Article VI, Puny Provisions of Article VII, Senseless Article VIII, Preponderant Provisions of Article IX, Worthless Articles XIV and XV, Meaningless Article XVI, Aimless Article XIX." And the author proves every one of his points.

D. G. VALENTINE.

CORRESPONDENCE

THE EDITOR,

The Modern Law Review.

Sir,

The interesting and stimulating article by Dr. H. O. Pappe in the May 1960 issue of the *Modern Law Review* will, I hope, induce readers more competent than I am to discuss the fundamental problems of legal policy and of philosophy which it raises. Much of what the author says will command widespread assent and much will provoke opposition. The purpose of this letter is to register such opposition to one point made by the author because I feel this is so vital a matter that the author's view should not be expressed without a challenge in the pages of the *Modern Law Review*.

At p. 268 Dr. Pappe refers to the attitude of the post-War German authorities to judges who had applied Nazi legislation, and the fact that the reason for the unwillingness to prosecute and punish such judges "was not that they had been acting lawfully on the execution of public justice, but that they had the defence of intimidation, and that, therefore, no court would sentence them." Dr. Pappe refers to section 54 (not, as he says section 53) of the Criminal Code of 1871 which deals with "necessity" (*Notstand*) as a defence according to which "no criminal offence has been committed if . . . the act was done in a

state of necessity, which was not caused by the fault of the defendant and which could not have been averted in any other way, for the purpose of saving the defendant or one of his near relatives from a present danger to life or limb." As Dr. Pappe rightly says, the application of this provision for the purpose of justifying the refusal to prosecute Nazi judges is an "extremely weak point" because the judge could have averted the threat by resigning. Nevertheless, says the learned author, "it appears to be materially justifiable as resignation of the judge would not have benefited the prisoner. Even in the case of an acquittal by the court-martial" (the judgment of which Dr. Pappe discusses) "the prisoner would have fallen victim to the Gestapo or SS, with the same result as that of the death sentence."

What does this amount to? The argument runs like this:

(a) The Nazi judge was guilty of a crime, unless he could plead necessity.
(b) He could not plead necessity if the danger to his life could be averted.
(c) It could in fact be averted by resignation.
(d) However, resignation would not have helped the victim of his crime because someone else would have committed the same or a similar crime.
(e) Hence it was right not to prosecute the judge.

It is beyond comprehension how the possibility or probability or even certainty of someone else killing or maiming or imprisoning the defendant could have relieved the judge of the duty to resign rather than to kill, to maim, or to imprison. How can it be said that he was after all in a state of "necessity" within the meaning of section 54, because the act of averting the danger to his own life would have induced someone else to commit a crime? This argument is equivalent to saying that a thief must be acquitted if he can establish that someone else would have stolen the goods had he not done so. As a general proposition the argument is ridiculous, but in the present context it is tragic: what it means is that in an emergency no one can be expected to uphold moral values because it would be useless to do so where the powers that be will have their way in any event. A state of general moral depravity cannot be used retrospectively to justify immoral conduct. Ordinary citizens may not be expected to act like heroes, but a judge cannot plead necessity where he is charged with having misused his office to commit a crime.

O. Kahn-Freund.

Sir,

The Justice Educational and Research Trust has appointed a small Committee under the chairmanship of the Rt. Hon. Lord Shawcross, P.C., to inquire into the means for investigating complaints of misuse of power by the Executive. The Committee will concern itself with administrative acts or decisions of Government Departments and other public bodies, where there is no tribunal or other statutory procedure available for dealing with the complaints; and in particular it will consider the Scandinavian institution known as the Ombudsman.

If any readers of this Journal wish to assist the Committee with evidence or suggestions, it would be appreciated if they would send a brief statement of their views to the Justice Educational and Research Trust, 1 Mitre Court Buildings, Temple, E.C.4.

John Whyatt.